SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kovacevic* [2020] QSC 399
PARTIES:	**THE QUEEN** (respondent) **v** **IAN JOHN KOVACEVIC** (applicant)
FILE NO/S:	Indictment No 1452 of 2019
DIVISION:	Trial
PROCEEDING:	Application filed on 4 October 2019
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 July 2020
DELIVERED AT:	Brisbane
HEARING DATE:	18 October 2019; further submissions on behalf of the respondent received on 12 February 2020; addendum outline of submissions on behalf of the applicant received on 13 February 2020
JUDGE:	Burns J
ORDER:	**Application dismissed**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – WARRANTS, ARREST, SEARCH, SEIZURE AND INCIDENTAL POWERS – SEARCH AND SEIZURE – where the applicant was charged on indictment with unlawful possession of dangerous drugs – where a vehicle the applicant was driving was directed by police to stop and then searched pursuant to ss 31 and 32 of the *Police Powers and Responsibilities Act 2000* (Qld) – where, during the search, dangerous drugs were discovered in the vehicle – where the applicant asserts that the search was unlawful – where the applicant seeks an order that the evidence obtained as a result of the search as well as various statements made by him in connection with the search be excluded from evidence at his trial – whether police had a reasonable suspicion that there may be a dangerous drug in the vehicle – whether the search was unlawful CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – EVIDENCE UNFAIR TO ADMIT OR IMPROPERLY OBTAINED – PARTICULAR CASES – where the applicant was charged on indictment with unlawful possession of dangerous drugs – where a vehicle the applicant was driving was directed by

police to stop and then searched pursuant to ss 31 and 32 of the *Police Powers and Responsibilities Act 2000* (Qld) – where, during the search, dangerous drugs were discovered in the vehicle – where the applicant seeks an order that the evidence obtained as a result of the search as well as various statements made by him in connection with the search be excluded from evidence at his trial – where the search was unlawful – whether, despite the unlawfulness of the search, the challenged evidence ought be admitted in the exercise of the court's discretion

Criminal Code 1899 (Qld), s 590AA
Drugs Misuse Act 1986 (Qld), s 9(1)(a)
Justices Act 1886 (Qld), s 110A
Police Powers and Responsibilities Act 2000 (Qld), s 5, s 7, s 31, s 32

Bunning v Cross (1978) 141 CLR 54, followed
Commissioner of Police v Flanagan [2019] 1 Qd R 249, followed
George v Rockett (1990) 170 CLR 104, cited
Kadir v The Queen; Grech v The Queen [2020] HCA 1, cited
R v Ireland (1970) 126 CLR 321, cited
R v Keen [2016] 2 Qd R 1, followed
R v Milos [2014] QCA 314, cited
R v Pollard (1992) 176 CLR 177, cited
R v Purdon [2016] QSC 128, cited
R v Rockford [2015] SASCFC 51, cited
Rowe v Kemper [2009] 1 Qd R 247, followed

COUNSEL: A J Edwards for the applicant
G J Webber and, subsequently, N Needham for the respondent

SOLICITORS: Owens & Associates for the applicant
Office of the Director of Public Prosecutions for the respondent

[1] The applicant is charged on indictment with one count of possession of cocaine in a quantity exceeding two grams and one count of possession of methylamphetamine, also in a quantity exceeding two grams. Each of these offences is alleged to have been committed on 26 March 2019 at West End. They were detected when a motor vehicle being driven by the applicant was stopped by police and searched.

The application

[2] The application is made pursuant to s 590AA of the *Criminal Code* (Qld) and, by it, a ruling is sought that the evidence obtained during the search as well as the conversations between the applicant and the police in connection with the search be excluded from the evidence at trial. In support of the application, it was contended that the search was unlawful because the police did not have reasonable grounds for reasonably suspecting

that dangerous drugs were in the vehicle. Alternatively, it was submitted that it would be unfair to admit the evidence against the applicant.

[3] The application was opposed by the Crown. It was argued that the search was lawful and that, even if the court were to determine otherwise, the evidence should nonetheless be admitted in the exercise of the court's discretion.

The evidence

[4] No witnesses were called to give evidence on the application, and nor was any affidavit material relied on. Instead, the parties were agreed that the application should be decided on the basis of a written statement prepared by the arresting officer, Senior Constable Nielsen, on 5 April 2019 and admitted pursuant to s 110A of the *Justices Act 1886* (Qld) at the committal hearing along with part of the depositions, that is to say, a transcript of the oral evidence given by SC Nielsen at that hearing.

[5] According to that written and oral evidence, on the morning of 26 March 2019, SC Nielsen along with other police officers were positioned at a "static random breath-testing site" on Dornoch Terrace, West End, not far from the junction of that roadway with Hardgrave Road. They were stopping vehicles travelling in both directions. At about 10.15 am, SC Nielsen heard the sound of a "loud vehicle engine" and a short time later observed a black Ford Falcon sedan with New South Wales licence plates appear from around the bend of Hardgrave Road and travel towards him. As the vehicle rounded the bend, SC Nielsen heard the "sound of the engine lower" and, as it approached the position where police were assembled, it was observed to slow down.

[6] SC Nielsen stood in the middle of the roadway and motioned for the vehicle to pull over. By the time it reached his position, the vehicle was "travelling very slowly". The applicant was the driver. He was accompanied by two other men, one seated in the front passenger seat and the other behind that man in the rear passenger compartment. All of the occupants in the vehicle were from New South Wales. The applicant was asked by another police officer to produce his driver's licence. This he did whilst also stating that he was the holder of a New South Wales learner's licence. Another police officer asked the man seated in the front passenger seat whether he had a current open driver's licence. SC Nielsen saw that this man's hands were "shaking" whilst he retrieved his New South Wales driver's licence and handed it to the other police officer.

[7] SC Nielsen checked the vehicle's registration. This revealed that the vehicle was not registered to the applicant or to the man seated next to him. The applicant said that the vehicle was owned by his brother. According to SC Nielsen, the applicant "appeared to be over chatty with us" and was "continually asking how to get back onto a main road". At the same time, SC Nielsen could hear the applicant's mobile phone "providing directions to a destination in the background". On questioning, the applicant told SC Nielsen they had arrived in Brisbane that morning and had "come up here to buy a car". When asked "where from", the applicant replied, "Don't know, haven't found one yet". According to his statement, SC Nielsen formed the impression whilst speaking to the applicant that he "continually tried to avoid our questions and get back to asking where a main road was to take them out of West End". He also had the impression that the other male occupants in the vehicle were "avoiding eye contact".

[8] Queensland Police intelligence checks were then conducted by SC Nielsen with respect to the applicant. These revealed that the applicant had "links to the Rebels Criminal Motorcycle Gang and was listed as a named person in a major drug investigation". SC Nielsen also observed there to be no other keys or keyrings with the vehicle key; it was "just a singular vehicle key". There was also a two-way handheld radio in a charging dock on the passenger's side floor of the vehicle.

[9] SC Nielsen decided to detain the vehicle and its occupants for the purpose of a search. The principal bases for that decision were set out in the following paragraph of his written statement:

> "As the vehicle slowed dramatically when it rounded the bend as if it were weighing up whether it would turn around to avoid coming through our static random breath testing site or not and the [applicant] continually trying to get instructions back to a main road and avoiding our conversations, I reasonably suspected the [applicant] had something in the vehicle that he shouldn't. I then advised the [applicant] of my name, rank and station and that I was detaining them for the purpose of a search."

[10] During the subsequent search, a sports bag was located in the boot of the vehicle. The applicant claimed ownership. Inside was $40,050 in cash and a wipes container with a false bottom concealing plastic bags containing what, on later analysis, were revealed to be 23.896 grams of cocaine within 54.435 grams of substance and 42.579 grams of methylamphetamine within 56.174 grams of substance.

[11] The applicant was questioned about the wipes container. He said that he found the container "a minute ago when I got out at the servo". He continued, "It was on the ground near my car when I got out". When asked "which servo" the applicant said, "Not the servo, I mean the shops, just here" and gestured towards shops situated on the corner of Dornoch Terrace and Hardgrave Road. The applicant then said, "I just got out and it was near my car. I assumed that it just had wipes in it, so I put it in my car. What's the go? What's the problem?".

[12] After the applicant was placed under arrest for possession of dangerous drugs, he was transported to the Upper Mount Gravatt Police Station. As they entered the police vehicle to travel back to the station, SC Nielsen asked the applicant if he could direct them to the shops where the wipes container was found. The applicant directed them to the intersection of Hill End Terrace and Montague Road. When they arrived at this intersection, the applicant gestured towards a traffic island and said, "As I was driving through this intersection, I saw the container right there so I stopped, opened my door and grabbed the container and drove off".

[13] SC Nielsen was cross-examined at the committal hearing about the bases for his suspicion (to the effect that the applicant "had something in the vehicle that he shouldn't"). He said that the bases extracted above (at [9]) — the vehicle slowing "dramatically" after it rounded the bend, the applicant "continually trying to get instructions back to a main road" and the applicant "avoiding our conversations" — as well as the feature that the applicant appeared nervous when spoken to gave rise to what he regarded as a reasonable suspicion that he "probably [had] drugs" in the vehicle. SC Nielsen agreed that the applicant made no attempt or indication that he was going to turn his vehicle away; he just slowed down, but this commenced from a "fair distance away". Of course SC Nielsen could not say what the applicant had been thinking. As to the

applicant continually trying to get instructions back to a main road, SC Nielsen agreed that, when the applicant asked for directions, he did not give him any assistance because he could hear audible directions emanating from the applicant's mobile telephone. SC Nielsen "did not check to see what directions [were being given or] where it was giving him directions". He said that he declined to give directions to the applicant because he presumed the applicant "already knew where he was going". As for avoiding conversations, SC Nielsen agreed, on reflection, that there were no questions he had asked which the applicant had declined to answer. He added:

> "It just didn't gel right with me the whole conversation that we were having … and his actions leading up to coming …. to our static RBT site."

[14] In the end, SC Nielsen settled on the bases for his suspicion; he agreed they were that "something didn't feel right", the applicant "slowed down" and "kept asking … for directions". He also clarified that the limited information he was able to discern from the intelligence checks did not have "a big bearing", and nor were the presence of the handheld radio or the singular vehicle key other than "minor contributors" to the formation of his suspicion.

[15] Lastly, it emerged during the cross-examination of SC Nielsen that there was a difference between the detail included in his written statement dated 5 April 2019 regarding the nature of his suspicion (and, therefore, the basis for the search) and what was written in the QP9 summary of events he completed much more contemporaneously, that is to say, on the evening of the day of the search (26 March 2019). In the statement, SC Nielsen stated that he suspected the applicant "had something in the vehicle that he shouldn't" (which, in oral evidence at the committal hearing he said were "probably drugs") whereas, in the QP9, it was recorded that the "police believed their presence in the area was suspicious and advised the vehicle occupants that they and their vehicle were being detained for the purpose of a search for drugs". When asked why he did not include what appears in his statement in the QP9, SC Nielsen was unable to provide an explanation.

Was the search lawful?

[16] The power to search the vehicle which the applicant was driving is derived from the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA). One of the purposes of the PPRA is to "ensure fairness to, and protect the rights of, persons against whom police officers exercise powers under this Act": s 5(e). Furthermore, it was the "Parliament's intention that police officers should comply with [the PPRA] in exercising powers and performing responsibilities under it": s 7(1).

[17] The power to search a vehicle without a warrant is conferred by s 31 of the PPRA. It is in these terms:

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

circumstances for which the vehicle and its occupants are detained.

(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)."

[18] Various "prescribed circumstances for searching [a] vehicle without [a] warrant" are specified in s 32 of the PPRA. These include that there is something in the vehicle which "may be an unlawful dangerous drug": s 32(c). The expression, "reasonably suspects" is defined in Schedule 6 (Dictionary) to the PPRA to mean "suspects on grounds that are reasonable in the circumstances". That definition is consistent with the common law – there must be a factual basis to reasonably ground the suspicion, but it is unnecessary that there exists proof of the fact reasonably suspected: *George v Rockett* (1990) 170 CLR 104, 115. A reasonable *suspicion* connotes something less than a reasonable *belief* but the fact or facts suspected must be more than a mere possibility. There must be something which would create in the mind of a reasonable person a suspicion that, relevantly, there may be an unlawful dangerous drug in the vehicle.

[19] 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: *R v Keen* [2016] 2 Qd R 1, [18] – [21]. In this regard, a suspicion is of course a state of mind which is concerned with circumstances as they appear to the holder to be at the relevant time rather than the circumstances as they actually are at that time: *Commissioner of Police v Flanagan* [2019] 1 Qd R 249, 264 [45]. But as I have just touched upon, there is more to it than that; not only must the police officer personally form the suspicion at the time when he decides to detain and search, the suspicion must be objectively reasonable in the sense that it must be based on facts which would create a reasonable suspicion in the mind of a reasonable person: *Rowe v Kemper* [2009] 1 Qd R 247, 254.

[20] Here, it was argued by Mr Edwards on behalf of the applicant that SC Nielsen could not have formed a reasonable suspicion that dangerous drugs were in the vehicle and that, as such, it should be concluded that the search was illegal and that all evidence flowing from it — the seized drugs as well as the statements made by the applicant — must be excluded from evidence at the trial: see *R v Purdon* [2016] QSC 128, [2] – [4]. Mr Edwards submitted that SC Nielsen did not have reasonable grounds to form such a suspicion and that, instead, all that he acted on was "a hunch or a feeling and he took a punt, which paid off". The point was made that, when he completed the QP9, SC Nielsen recorded that the presence of the three men in the area was suspicious but, by the time his statement was prepared almost two weeks later, and subsequently when he gave evidence at the committal hearing, he asserted that he suspected that the applicant had something in his vehicle which were "probably drugs".

[21] I do not think much turns on the difference between the contents of the QP9 and SC Nielsen's statement. The former must be taken to have been prepared as a general summary of the relevant events rather than a precise of account of what exercised SC Nielsen's mind at the time when he formed the suspicion that the applicant may have had dangerous drugs in his vehicle. The more critical question is whether the factual bases identified above (at [14]) were sufficient to ground a reasonable suspicion that the applicant might have dangerous drugs in the vehicle. To the point, would knowledge of those facts create such a suspicion in the mind of a reasonable person?

[22] I think not. Although I have no doubt that SC Nielsen believed he had a sufficient basis to detain the occupants of the vehicle and search it, I am not persuaded that the facts he identified, even when considered in aggregation, were sufficient to give rise to a suspicion in the mind of a reasonable person that the applicant may have dangerous drugs in his vehicle. Although I accept that they were enough to engage SC Nielsen's intuition to that effect and, of course, this proved to be entirely correct, the collection of circumstances ultimately relied on by SC Nielsen would not have been sufficient to create a suspicion in the mind of a reasonable person that the applicant may have dangerous drugs in his vehicle. SC Nielsen's evidence that "something didn't feel right" was just another way of expressing his intuition and, without more, could not advance an objective consideration of what exercised his mind at the time when he decided he had a sufficient basis to detain the occupants of the vehicle and search it. The other principal facts relied on — that the applicant "slowed down" and that the applicant "kept asking … for directions" — were hardly enough to create the relevant suspicion, although they may have been if bolstered by one or more of the other facts identified above (at [14]) but SC Nielsen made clear in his evidence at the committal hearing that they did not have a "big bearing" on his state of mind. It follows that, absent the essential prerequisite to the existence of the power to search the vehicle — a *reasonable* suspicion — the search was not lawful.

Should the court exercise its discretion against exclusion?

[23] That, however, is not the end of the matter. Even if, as I have just found, there was no proper basis for the search of the vehicle, it does not follow that the evidence obtained on the search or the questioning of the applicant will automatically be excluded from evidence at the trial. That is because, as the Crown submitted, the court may nevertheless exercise its discretion against exclusion: *R v Ireland* (1970) 126 CLR 321, 335; *Bunning v Cross* (1978) 141 CLR 54, 72, 78 – 80; *R v Pollard* (1992) 176 CLR 177, 202 – 203; *R v Milos* [2014] QCA 314, [93].

[24] In that regard, I start from the long-accepted premise that there are considerations of "high public policy" which favour exclusion of evidence procured by unlawful conduct on the part of investigating police, namely, the "threat which disregard of the law by those empowered to enforce it represents to the legal structure of our society and the integrity of the administration of criminal justice": *R v Rockford* [2015] SASCFC 51, [39]. Indeed, it has been observed that "acts in breach of a statute would more readily warrant the rejection of the evidence as a matter of discretion; or the statute may on its proper construction itself impliedly forbid the use of facts or things obtained or procured in breach of its terms": *R v Ireland*, 334. In all such cases, the court must carefully weigh the competing "public requirements":

> "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": *R v Ireland*, 335.

[25] That said, it has also been observed that:

> "[I]t may be quite inappropriate to treat isolated and merely accidental non-compliance with statutory safeguards as leading to inadmissibility of the resultant evidence when of their very nature they involve no overt defiance of the will of the legislature or calculated disregard of the common law and when the reception of the evidence thus provided does not demean the court as a tribunal whose concern is in upholding the law": *Bunning v Cross*, 78.

[26] Here, and contrary to what was submitted on behalf of the applicant, I do not regard the search as having occurred in deliberate disregard of the law. Although I have found that the search was unlawful, that is not say that SC Nielsen did not believe at the time that he had a lawful basis (and, therefore, statutory power) to detain the occupants of the vehicle and search it. Rather, the unlawfulness of the search comes about because I was not persuaded that the facts identified by SC Nielsen were sufficient to give rise to a suspicion in the mind of a reasonable person that dangerous drugs may have been in the vehicle. In truth, SC Nielsen made an evaluative judgment, in the field, which (when assessed objectively) I have found to be erroneous, but that does not mean that he acted intentionally or even recklessly in defiance of the law. Had he done so, that would tell against the admission of the evidence (*R v Milos*, [93]; *Kadir v The Queen; Grech v The Queen* [2020] HCA 1, [18] – [20]) but neither is the case. To the extent that the applicant's counsel submitted that SC Nielsen had "attempted to dress up the mere possibility of the presence of drugs with circumstances which, upon analysis at committal, quickly faded away", I do not think that is a fair reading of his evidence. SC Nielsen made concessions regarding a range of matters when giving evidence at the committal hearing and, had he been of the mind to skew the true facts, he could have relied, for example, on the existence of the criminal intelligence to support, and perhaps in an unassailable way, reasonable grounds for a suspicion. Instead, he quite candidly stated in evidence that the intelligence did not have a "big bearing" on the formation of his suspicion. This was not a case where there was a deliberate "cutting of corners" by SC Nielsen or any intentional disregard of the requirements under the PPRA.

[27] Furthermore, as Mr Edwards conceded, the cogency of the evidence gathered by the police in consequence of the search is not diminished and the offences with which the applicant is charged are most serious. By them, it is alleged that the applicant was in

possession of significant, aggravated quantities of two separate Schedule 1 drugs. On conviction for either offence, the maximum penalty is 25 years imprisonment: *Drugs Misuse Act 1986* (Qld), s 9(1)(a).

[28] Finally, I do not agree that, on its proper construction, the PPRA "impliedly forbids" the reception of evidence obtained through non-compliance with its safeguards. To construe the statute in that way would leave no room for the operation of the court's discretion and, for that reason, a clear expression of that legislative intention would be required before the PPRA could have that effect. Of course, in the exercise of that discretion, the court must keep steadily in mind that one of the purposes of the PPRA is to "ensure fairness to, and protect the rights of, persons against whom police officers exercise powers" under it and that Parliament intended that police officers should comply with its provisions, but so too should the other discretionary factors I have mentioned be taken into account and weighed in the balance. Having done so, in the exercise of my discretion, I decline to exclude the challenged evidence.

Disposition

[29] For these reasons, the application is dismissed.