Abuse of power and the *Bunning v Cross* discretion[1]

Justice Peter Davis[2]

It is well-established that evidence which is obtained by police unlawfully or improperly may be excluded in exercise of discretion.[3] The discretion is easily identified as arising in cases where the police act without any apparent power. The discretion also arises where there is an identifiable power but the power has been misused.

A police power is, relevantly to the *Bunning v Cross* discretion, misused if the power is used for an improper or ulterior purpose. It became apparent in recent cases that police have been improperly using traffic powers to intercept drivers of vehicles in order to pursue drug, not traffic investigations. In so doing, the police avoid statutory safeguards for the exercise of powers of interception of vehicles in the course of criminal investigations.

Here, the cases and their ramifications are explained.

The *Bunning v Cross* discretion

Evidence may be excluded upon the exercise of various identified discretions, eg the *Christie* discretion,[4] the fairness discretion[5] and the *Bunning v Cross* discretion.

While the exercise of discretion to exclude illegally or improperly obtained evidence benefits an accused, the *Bunning v Cross* discretion is exercised upon a balance of competing public policy grounds. It is not the interests of the accused which are primarily under consideration but the balancing of the public interest in the enforcement of the criminal law against the need to denounce improper conduct by those enforcing the law.[6]

The various factors which might be considered in exercise of discretion were summarised by Stephen and Aickin JJ in *Bunning v Cross*[7] in a passage that has received significant judicial

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1 A paper delivered to the Central Queensland Law Association Conference, 8-9 September 2023.

2 Judge of the Supreme Court of Queensland, President of the Industrial Court of Queensland and the Queensland Industrial Relations Commission.

3 *R v Ireland* (1970) 126 CLR 321 and *Bunning v Cross* (1978) 141 CLR 54 and more recent cases confirming the principle: *Ridgeway v the Queen* (1995) 184 CLR 19, *R v Swaffield* (1998) 192 CLR 159, *Nicholas v R* (1998) 193 CLR 173, *Smethurst v Commissioner of Police* (2020) 272 CLR 177.

4 *R v Christie* [1914] AC 545; where the prejudicial effect of evidence outweighs its probative value.

5 Considered in depth in *Police v Dunstall* (2015) 256 CLR 403.

6 *R v Ireland* (1970) 126 CLR 321 at 334-5 and *Bunning v Cross* (1978) 141 CLR 54 at 72.

7 At page 78 and following.

attention. There are many many cases where intermediate courts of appeal have considered the exercise of the discretion.

In both the recent cases where the improper use of traffic powers was considered, the evidence was excluded in exercise of discretion. The focus of this paper is not upon the exercise of the discretion but the circumstances in which the discretion may arise where police officers use a statutory power for an improper purpose.

Statutory interpretation

Any police power under consideration will no doubt be a statutorily bestowed power.[8] An analysis of impropriety in the exercise of power must commence with careful consideration of the provisions granting the power. Determination of the width, and permissible use of a police power is ultimately an exercise in statutory interpretation.

A statute granting any executive power will typically:

1. specify any preconditions to the power arising. With a police power that is typically the formation of a state of mind by the police officer: a "belief" or a "reasonable belief" or a "suspicion" or a "reasonable suspicion" in the existence of a thing or a state of affairs. I shall refer to this element as "the jurisdictional fact";

2. specify the power itself, ie what the police officer can do in exercise of the power.

A well-known example of a typical grant of executive power can be seen in *George v Rockett*,[9] although that is a case concerning the grant of power to a justice of the peace to issue a search warrant rather than the grant of power to a police officer. It is well-established that where a police officer acts pursuant to a search warrant, the statute authorises the warrant but the warrant authorises the search, so the extent of the police officer's power of search is determined by the warrant.[10]

In *George v Rockett*, an appeal from Queensland, the statute[11] provided, relevantly:

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8 *Police Powers and Responsibilities Act* 2000.
9 (1990) 170 CLR 104.
10 *Trimboli v Onley (No 3)* (1981) 56 FLR 321 at 327 followed in *Jeremiah v Lawrie* (2016) 39 NTLR 191 at [4] and see generally *Smethurst v Commissioner of Police* (2020) 272 CLR 177.
11 *Criminal Code*, s 679.

> "If it appears to a justice, on complaint made on oath, that there are reasonable grounds for suspecting that there is in any house, vessel, vehicle, aircraft or place — (a) Anything with respect to which any offence which is such that the offender may be arrested with or without warrant has been, or is suspected, on reasonable grounds, to have been, committed; or (b) Anything whether animate or inanimate and whether living or dead as to which there are reasonable grounds for believing that it will of itself or by or on scientific examination, afford evidence as to the commission of any offence; or (c) Anything as to which there are reasonable grounds for believing that it is intended to be used for the purpose of committing any such offence; he may issue his warrant directing a police officer ... to enter, by force if necessary, and to search such house, vessel, vehicle, aircraft, and place, and to seize any such thing if found, and to take it before a justice to be dealt with according to law ..."[12]

The power to issue the warrant was vested in the justice of the peace. The jurisdictional fact was that "… it appears to [the justice of the peace], on complaint made on oath that there are reasonable grounds for suspecting that there is [a relevant thing] in any house …". The power then arose to issue a warrant authorising the police officer to enter and search and seize things found.

Several questions arose as to the proper construction of the jurisdictional fact. Importantly, it was held:

1. any satisfaction of the justice of the peace may only be formed from the "complaint on oath";

2. the justice of the peace must be satisfied that there are "reasonable grounds for suspecting" that there are certain things in the place to be searched; and

3. if reliance is had on the thing identified in the sentence following "(b)" in the section, the justice of the peace must be satisfied that there are "reasonable grounds for believing those things will afford evidence as to the commission of any offence;

4. the justice of the peace need not personally hold the relevant suspicion and belief.

Ultimately, the case is perhaps of most significance as drawing and explaining the distinction between holding a "belief" or holding a "suspicion" which are two different states of intellectual conviction.[13]

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12 *George v Rockett* (1990) 170 CLR 104; relevant parts of the section at page 104.

13 At page 115 following *Hussien v Chong Fook Kam* [1970] AC 942 at 948 and *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266.

George v Rockett has no direct relevance to the exercise of police powers as being considered here. However, the case stands as a prime example of the definition of the boundaries of executive power through careful construction of the statute bestowing the power.

The principles governing the construction of statutes has been the subject of much examination by the High Court.[14] In *R v A2*[15] the High Court authoritatively summarised the relevant principles as follows:

> "32 The method to be applied in construing a statute to ascertain the intended meaning of the words used is well settled. It commences with a consideration of the words of the provision itself, but it does not end there. A literal approach to construction, which requires the courts to obey the ordinary meaning or usage of the words of a provision, even if the result is improbable,[16] has long been eschewed by this Court. It is now accepted that even words having an apparently clear ordinary or grammatical meaning may be ascribed a different legal meaning after the process of construction is complete.[17] This is because consideration of the context for the provision may point to factors that tend against the ordinary usage of the words of the provision.[18]
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> 33 Consideration of the context for the provision is undertaken at the first stage of the process of construction.[19] Context is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is intended to remedy.[20] 'Mischief' is an old expression.[21] It may be understood to refer to a state of affairs which to date the law has not addressed. It is in that sense a defect in the law which is now sought to be remedied.[22] The mischief may point most clearly to what it is that the statute seeks to achieve.

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14 *K&S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, *Federal Commissioner of Taxation v Consolidated Media Holdings Pty Ltd* (2012) 250 CLR 503, *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936, *Unions NSW v New South Wales* (2019) 93 ALJR 166.

15 (2019) 269 CLR 507.

16 See, eg, *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd ("Engineers' Case")* (1920) 28 CLR 129 at 162 per Higgins J.

17 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

18 Bennion, *Statutory Interpretation*, 3rd ed (1997), pp 343-344, referred to in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78].

19 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

20 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

21 *Heydon's Case* (1584) 3 Co Rep 7a at 7b [76 ER 637 at 638].

22 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg* [1975] AC 591 at 614; *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503 at 509; *Wacando v The Commonwealth* (1981) 148 CLR 1 at 17.

34 This is not to suggest that a very general purpose of a statute will necessarily provide much context for a particular provision or that the words of the provision should be lost sight of in the process of construction. These considerations were emphasised in the decisions of this Court upon which the Court of Criminal Appeal placed some weight.

35 The joint judgment in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [23] rejected an approach which paid no regard to the words of the provision and sought to apply the general purpose of the statute, to raise revenue, to derive a very different meaning from that which could be drawn from the terms of the provision. The general purpose said nothing meaningful about the provision, the text of which clearly enough conveyed its intended operation.[24] Similarly, in *Saeed v Minister for Immigration and Citizenship*[25] the court below was held to have failed to consider the actual terms of the section. A general purpose of the statute, to address shortcomings identified in an earlier decision of this Court, was not as useful as the intention revealed by the terms of the statute itself. In *Baini v The Queen*,[26] it was necessary to reiterate that the question of whether there had been a "substantial miscarriage of justice" within the meaning of the relevant provision required consideration of the text of the provision, not resort to paraphrases of the statutory language in extrinsic materials, other cases and different legislation.

36 These cases serve to remind that the text of a statute is important, for it contains the words being construed, and that a very general purpose may not detract from the meaning of those words. As always with statutory construction, much depends upon the terms of the particular statute and what may be drawn from the context for and purpose of the provision.

37 None of these cases suggest a return to a literal approach to construction. They do not suggest that the text should not be read in context and by reference to the mischief to which the provision is directed.[27] They do not deny the possibility, adverted to in *CIC Insurance Ltd v Bankstown Football Club Ltd*,[28] that in a particular case, "if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance". When a literal meaning of words in a statute does not conform to the evident purpose or policy of the particular provision, it is entirely appropriate for the courts to depart from the

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23 (2009) 239 CLR 27 at 46-47 [47].
24 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-48 [47]-[53].
25 (2010) 241 CLR 252 at 265 [32]-[34].
26 (2012) 246 CLR 469 at 476 [14].
27 See *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47].
28 (1997) 187 CLR 384 at 408.

> literal meaning.[29] A construction which promotes the purpose of a statute is to be preferred.[30]"

Coercive powers exercisable by police officers will invariably impact upon the rights of the citizen whose person or property is the subject of search. A search of a person without consent, but with statutory authority, is an authorised assault. The entry upon a person's premises without consent but pursuant to powers of search is an authorised trespass. The seizure of property found during a search constitutes an interference with proprietary, or at least possessory, rights.

Statutes which authorise such an invasion of rights attract consideration of the principle of legality.

As long ago as 1908, in *Potter v Minahan*[31] the principle of construction that would later become known as the principle of legality was endorsed by the High Court by approval of a statement in Maxwell's *On the Interpretation of Statutes*:[32]

> "It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, *or depart from the general system of law*, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used." (emphasis added)

In *Momcilovic v The Queen*,[33] the High Court considered a provision in the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) which reversed the onus of proof in a prosecution for a drug offence. The High Court considered the construction of the provision in light of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic), and French CJ made a series of observations as to the principle of legality:

> "43 The principle of legality has been applied on many occasions by this Court. It is expressed as a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the electorate. It requires that statutes be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common

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29 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321.
30 *Interpretation Act* 1987 (NSW), s 33.
31 (1908) 7 CLR 277 at 304.
32 4th edition (1905) page 122.
33 (2011) 245 CLR 1.

law.[34] The range of rights and freedoms covered by the principle has frequently been qualified by the adjective "fundamental". There are difficulties with that designation.[35] It might be better to discard it altogether in this context. The principle of legality, after all, does not constrain legislative power.[36] Nevertheless, the principle is a powerful one. It protects, within constitutional limits, commonly accepted "rights" and "freedoms". It applies to the rules of procedural fairness in the exercise of statutory powers.[37] It applies to statutes affecting courts in relation to such matters as procedural fairness and the open court principle, albeit its application in such cases may be subsumed in statutory rules of interpretation which require that, where necessary, a statutory provision be read down so as to bring it within the limits of constitutional power.[38] It has also been suggested that it may be linked to a presumption of consistency between statute law and international law and obligations.[39]

44 The common law "presumption of innocence" in criminal proceedings is an important incident of the liberty of the subject. The principle of legality will afford it such protection, in the interpretation of statutes which may affect it, as the language of the statute will allow. A statute, which on one construction would encroach upon the presumption of innocence, is to be construed, if an alternative construction be available, so as to avoid or mitigate that encroachment. On that basis, a statute which could be construed as imposing either a legal burden or an evidential burden upon an accused person in criminal proceedings will ordinarily be construed as imposing the evidential burden."

In *X7 v Australian Crime Commission*,[40] the High Court considered the proper construction of a section of the *Australian Crime Commission Act* 2002 (Cth) which authorised an examiner appointed under that Act to direct a person to answer questions on an examination convened pursuant to the Act. The question was whether that power ought to be read so as to compel a

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34 *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J; *Bropho v Western Australia* (1990) 171 CLR 1 at 18 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Coco v The Queen* (1994) 179 CLR 427 at 436-437 per Mason CJ, Brennan, Gaudron and McHugh JJ; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] per Gleeson CJ.

35 Finn, "Statutes and The Common Law: The Continuing Story", in Corcoran and Bottomley (eds), *Interpreting Statutes* (2005) 52, at pp 56-57, citing *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 298-299 [27]-[29] per McHugh J.

36 Whether there are certain common law rights and freedoms which constrain legislative power is an unexplored question: *South Australia v Totani* (2010) 242 CLR 1 at 29 [31] per French CJ. See also reasons of Crennan and Kiefel JJ at [562]. For a discussion of common law constraints on the executive power see Harris, "Government 'Third-Source' Action and Common Law Constitutionalism", *Law Quarterly Review*, vol 126 (2010) 373.

37 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 258-259 [11]-[15] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

38 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 520-521 [47]-[49] per French CJ, and cases there cited.

39 Lacey, "The Judicial Use of Unincorporated International Conventions in Administrative Law: Back-Doors, Platitudes and Window-Dressing", in Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (2005) 82, at pp 84-85.

40 (2013) 248 CLR 92.

person who had been charged with an offence to answer questions. The majority (Hayne, Bell JJ and Kiefel J, as her Honour then was) held not.

Hayne and Bell JJ, in a joint judgment, said, after referring to *Potter v Minahan*:

> "This rule of construction has found most frequent application in this Court with respect to legislation which may affect rights. In that context, it has come to be referred to as a "principle of legality".[41] But the rule is not confined to legislation which may affect rights. It is engaged in the present case because of the effects which the asserted construction of the ACC Act provisions authorising compulsory examination would have not only on the rights, privileges and immunities of a person charged with an indictable Commonwealth offence, but also on a defining characteristic of the criminal justice system. In particular, it would alter to a marked degree the accusatorial nature of the criminal justice system. To hold that the general words of the relevant provisions of the ACC Act authorise compulsory examination of a person charged with an indictable Commonwealth offence about the subject matter of the offence charged would thus depart in a marked degree from the "general system of law"."[42]

The application of the principle of legality can raise very complicated issues as the cases which followed from *X7* demonstrate.[43] A full examination of the scope of the principle is beyond the boundaries of this paper. Suffice to say that statutes bestowing coercive powers upon police give rise to consideration of the principle of construction known as the principle of legality.

General principles as to purpose

As will be seen, various provisions of the *Police Powers and Responsibilities Act* 2000 (PPRA) contain an express purpose for which the power is conferred. However, in Australia, no statutory discretion (such as an exercise of power) is unfettered.[44] It follows that even where there is no purpose expressed in the relevant provision, the power is limited to the statutory purpose for which it was bestowed.[45]

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41 See, eg, *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] per Gleeson CJ; *Momcilovic v The Queen* (2011) 245 CLR 1 at 46-47 [43] per French CJ.

42 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [87].

43 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459, *Strickland (a pseudonym)) v Commonwealth Director of Public Prosecutions* (*Cth)* (2018) 266 CLR 325, *Alford v Parliamentary Joint Committee on Corporations and Financial Services* (2018) 264 CLR 289.

44 *Shrimpton v Commonwealth* (1945) 69 CLR 613 at 629-630 and *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478.

45 *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1 at 48, *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746, *Deputy Commissioner of Taxation v De Vonk* (1995) 61 FCR 564, *Arthur Yates & Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37 at 82, *Williams v Keelty* (2001) 111 FCR 175, *Grollo v Macauley* (1995) 56 FCR 533, *Australian Securities and Investments Commission v Rich* (2005) 220 ALR 324.

In *O'Reilly v State Bank of Victoria Commissioners*[46] delegates of the Commissioner of Taxation sought to exercise powers under ss 263 and 264 of the *Income Tax Assessment Act* 1936 (Cth). Section 263 provided:

> "The Commissioner, or any officer authorized by him in that behalf, shall at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of this Act, and for that purpose may make extracts from or copies of any such books, documents or papers." (emphasis added)

It can be seen that s 263 only specified "purposes" by reference to the purposes of the Act. This was said:

> "As a matter of ordinary language, access to buildings and places involves availability of entry to them: access to books and documents involves availability of examination of their contents. The express provision that the Commissioner or his authorized officer shall have "full" access prima facie conveys, at the least, that the availability of entry or examination to which the Commissioner or an authorized officer is entitled extends to any part of the relevant place or building and to the whole of the relevant books, documents and other papers. The express provision that the access shall be "free" conveys, at the least, that access is to be without physical obstruction. Implicit in the grant of full and free access which the section contains is a grant of power to the Commissioner or an authorized officer to take whatever steps are, in all the circumstances, reasonably necessary and appropriate to remove any physical obstruction to that access. Like all statutory powers, that power must be used bona fide for the purposes for which it was conferred and that involves that its exercise be not excessive in the circumstances of the case."[47] (emphasis added)

The *Police Powers and Responsibilities Act* 2000

Chapter 1 is headed "Preliminary". It contains various basic provisions, including s 5 which states the purposes of the PPRA. Section 5 is in terms:

> "**5 Purposes of Act**
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> The purposes of this Act are as follows—
>
> (a) to consolidate and rationalise the powers and responsibilities police officers have for investigating offences and enforcing the law;
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> (b) to provide powers necessary for effective modern policing and law enforcement;
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> (c) to provide consistency in the nature and extent of the powers and responsibilities of police officers;

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46 (1983) 153 CLR 1.

47 At page 48.

(d) to standardise the way the powers and responsibilities of police officers are to be exercised;

(e) to ensure fairness to, and protect the rights of, persons against whom police officers exercise powers under this Act;

(f) to enable the public to better understand the nature and extent of the powers and responsibilities of police officers;

(g) to provide for the forced muster of stray stock."

Chapter 2 is entitled "General enforcement powers". Within Chapter 2 are various parts. Part 1 is entitled "Entry, inquiries and inspection" and, as the heading suggests, bestows upon police various powers of somewhat general application. Parts 2 and following each contains a bundle of provisions bestowing and regulating powers relating to particular subject matters.

Part 2 is entitled "Searching persons, vehicles and places without warrant". This includes ss 29, 30, 31 and 32. Those provisions are:

"**29 Searching persons without warrant**

(1) A police officer who reasonably suspects any of the prescribed circumstances for searching a person without a warrant exist may, without a warrant, do any of the following—

(a) stop and detain a person;

(b) search the person and anything in the person's possession for anything relevant to the circumstances for which the person is detained.

(2) 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 30(b) applies, that is an antique firearm.

30 Prescribed circumstances for searching persons without warrant

(1) The prescribed circumstances for searching a person without a warrant are as follows—

(a) the person has something that may be—

(i) a weapon, knife or explosive the person may not lawfully possess, or another thing that the person is prohibited from

possessing under a domestic violence order or an interstate domestic violence order; or

(ii) an unlawful dangerous drug; or …"[48]

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).

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48 The long list of things need not be set out. Importantly, they are not traffic related.

32 Prescribed circumstances for searching vehicle without warrant

(1) It is a prescribed circumstance for searching a vehicle without a warrant that there is something in the vehicle that—

(a) may be a weapon, knife or explosive a person may not lawfully possess, or another thing that the person is prohibited from possessing under a domestic violence order or an interstate domestic violence order; or

(b) may be an antique firearm that a person possesses and the person is not a fit and proper person to possess the firearm—

(i) because of the person's mental and physical fitness; or

(ii) because a domestic violence order has been made against the person; or

(iii) because the person has been found guilty of an offence involving the use, carriage, discharge or possession of a weapon; or

(c) may be an unlawful dangerous drug …"[49] (emphasis added)

Part 3 is entitled "Use of detection dogs without warrant". Part 3A is entitled "Jack's Law—Use of hand held scanners without warrant in safe night precincts and public transport stations". This is the well-publicised legislative response to the knifing death of Jack Beasley in Surfers Paradise in 2019.[50]

Part 4 is entitled "Power to require name, address or age" which is self-explanatory, as is Part 5 headed "Directions to move on". Part 6 is headed "Breaches of the peace, riots and prevention of offences". Part 6A is headed "Prevention of criminal consorting". Part 7 is entitled "Out of control events". This gives additional powers to police officers to deal with assemblies of persons who behave in a disorderly manner.[51]

Chapter 3 is headed "Powers relating to vehicles and traffic". Various powers are granted by this chapter. Of significance here is s 60. It is in terms:

"**60 Stopping vehicles for prescribed purposes**

(1) A police officer may require the person in control of a vehicle, other than a train or a vehicle being pulled by an animal, to stop the vehicle for a prescribed purpose.

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49 Again, the long list need not be set out. Importantly, they do not relate to general traffic enforcement.
50 *R v OCP & Ors* [2022] QSC 138.
51 See generally, s 53BC.

(2) The person must comply with the requirement, unless the person has a reasonable excuse.

Maximum penalty—

(a) for a private vehicle—60 penalty units; or

(b) for a heavy vehicle, if the purpose for stopping the vehicle is HVNL(Q) compliance or enforcement—the corresponding HVNL(Q) penalty amount; or

Note—

On the commencement of this note, the corresponding HVNL(Q) penalty amount was $6,000. Generally, see section 53C.

(c) otherwise—90 penalty units.

Example of a reasonable excuse for subsection (2)—

It is a reasonable excuse for a person not to comply with a requirement if—

(a) the person reasonably believes that to immediately comply would endanger the person or someone else; and

(b) the person complies with the requirement at the first reasonable opportunity.

(3) The prescribed purposes are as follows—

(a) for enforcing a transport Act or the Heavy Vehicle National Law (Queensland);

(b) to check whether the vehicle complies, or the person is complying, with a transport Act or the Heavy Vehicle National Law (Queensland) …"[52] (emphasis added)

It is unnecessary to analyse any of the chapters which follow Chapter 3 except to note that some contain provisions bestowing powers to be used for specified purposes.[53]

Section 29(1) prescribes a jurisdictional fact for the exercise of the power to search persons without warrant. If the police officer "reasonably suspects any of the prescribed circumstances

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52 Again, the long list need not be set out. Importantly, the prescribed purposes are either traffic related, or concern specific provisions of the *Tobacco and Other Smoking Products Act* 1998 or the *Peace and Good Behaviour Act* 1982.

53 For example, see s 135, stopping animals for prescribed purposes; s 733, keeping drugs for training purposes; the search warrant provisions (s 150 and following) authorise the issue of search warrants for a purpose … to search and seize.

for searching a person without warrant", then a power arises to stop and detain the person,[54] search the person and things in his possession,[55] and seize things found.[56]

The prescribed purposes are those listed in s 30. Relevantly to the cases to be considered here is the purpose prescribed by s 30(1)(a)(ii); presence of an unlawful dangerous drug.

Relevantly then, the powers to stop, detain, search a person and seize the things found only arise when the police officer who is exercising the powers reasonably suspects that the person searched is in possession of an unlawful dangerous drug.

Section 31(1) prescribes a jurisdictional fact for the exercise of a power to search a vehicle. If a police officer "reasonably suspects any of the prescribed circumstances for searching a vehicle without a warrant exist", then a power arises to stop the vehicle,[57] detain the vehicle and its occupants,[58] search the vehicle,[59] and seize things found.[60]

The prescribed circumstances for the purposes of s 31 are those listed in s 32. Relevantly to the cases to be considered here is the purpose prescribed by s 32(1)(c); presence of an unlawful dangerous drug.

Relevantly, then, the power to stop a vehicle, detain it and the occupants, search the vehicle and seize anything found only arises when the police officer who is exercising the power reasonably suspects that there is an unlawful dangerous drug in the vehicle.

Section 60 empowers a police officer "to stop [a] vehicle for a prescribed purpose".[61] The prescribed purposes are those listed within s 60(3). They include, relevantly here, "to check whether … the person is complying with a transport Act…".[62] A "transport Act" includes the *Transport Operations (Road Use Management) Act* 1995 (the TORUM).[63]

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54 Section 29(1)(a).
55 Section 29(1)(b).
56 Section 29(2).
57 Section 31(1)(a).
58 Section 31(1)(b).
59 Section 31(1)(c).
60 Section 31(5).
61 Section 60(1).
62 Section 60(3)(b).
63 *Police Powers and Responsibilities Act* 2000, Schedule 6, definitions of "Transport Act" and "Road Use Management Act".

Under the TORUM, a person cannot drive a motor vehicle without a driver's licence. Consequently, the interception of a motor vehicle for the purposes of checking whether the driver possesses a current driver's licence is arguably a step taken in "checking compliance with a transport Act".[64] This is known commonly by police as a "licence check".

It can be seen that there is no jurisdictional fact as a precondition to the exercise of the power under s 60(1). In other words, the police officer need not form a belief or suspicion, reasonable or otherwise, that a person does not hold a driver's licence before exercising the power under s 60(1) for the purpose prescribed by s 60(3)(b).

The problem that has arisen

Both s 31 and s 60 of the PPRA empower a police officer to intercept a motor vehicle, but do so for different purposes. Section 31 empowers interception of the vehicle for the purposes prescribed by s 32, and s 60 empowers interception for the purposes prescribed by s 60(3). Importantly, the powers bestowed by s 29 (search a person without warrant) are subject to the existence of a jurisdictional fact, namely the police officer reasonably suspects the existence of a circumstance prescribed by s 30. The powers bestowed by s 31 (stop and search a vehicle) are subject to the existence of a jurisdictional fact, namely the police officer reasonably suspects the existence of a circumstance prescribed by s 32.

Section 60 has a limitation as to purpose but not an express requirement that a police officer form any state of mind.

The jurisdictional fact prescribed by each of ss 29 and 31 has two parts. There must be a subjectively held suspicion. In other words, the police officer must actually suspect that a dangerous drug is on the person (ss 29 and 30) or in the vehicle (ss 31 and 32) which is to be intercepted.

A suspicion is not a degree of intellectual conviction as high as a belief. In *Queensland Bacon Pty Ltd v Rees*,[65] Kitto J described a suspicion as:

> "A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting

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64 Section 60(3)(b).
65 (1966) 155 CLR 266.

> to 'a slight opinion, but without sufficient evidence', as Chambers's Dictionary expresses it."[66]

In *Hussien v Chong Fook Kam*,[67] Lord Develin, sitting in the Privy Council, described "suspicion" as:

> "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end."[68]

Both the opinions of Kitto J and Lord Devlin were approved in *George v Rockett*.[69]

Secondly, the suspicion must be a "reasonable suspicion". The PPRA defines "**reasonably suspects** means suspects on grounds that are reasonable in the circumstances".[70]

It is one thing for a police officer to hold a suspicion that there may be drugs in a particular vehicle. It is quite another to hold that suspicion on reasonable grounds.

Once a vehicle is intercepted, in that it is stopped and police are speaking to the driver by the side of the road, formation of a reasonable suspicion to then justify detention and search becomes easier. Police can observe what is in the vehicle. They can observe the demeanour of the driver and ascertain whether he is apparently drug affected, etc.

In *R v Fuentes*,[71] police intercepted a vehicle in purported exercise of powers vested by s 60 of the PPRA. The evidence said to justify the interception was:

> "It is our usual procedure. It's what our squad does. We conduct a large number of vehicle intercepts. We target drugs and that sort of stuff. We also have a legislative power to intercept vehicles and check licences and that sort of stuff as well.
>
> Why did you pull the vehicle over, that particular vehicle?-- Because we looked at it and said, 'Yep. It looks good.' It looked like a usual vehicle. The guys looked at us and looked quite startled when they initially saw us which is, you know, something that we look for. Whenever we drive past someone if we see a reaction that causes us suspicion then we will go and intercept that vehicle.
>
> It is the case, isn't it, it was a flashy car, I think you said and they were young guys in it; isn't that right?-- It was part of the observations, yes."[72]

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66 *Queensland Bacon Pty Ltd v Rees* (1966) 155 CLR 266 at 303.
67 [1970] AC 942.
68 *Hussien v Chong Fook Kam* [1970] 942 at 948.
69 (1990) 170 CLR 104.
70 Section 3, Schedule 6, definition of "reasonably suspects".
71 (2012) 230 A Crim R 379.
72 At 381.

After the vehicle was intercepted and further observations made, it was searched in reliance on s 31 and drugs were found. That led to further investigations and Mr Fuentes was ultimately charged with various offences against the *Drugs Misuse Act* 1986. Dalton J (as her Honour then was) found the search of the car to be lawful and therefore no *Bunning v Cross* discretion arose.

While the lawfulness of the interception was challenged, it was not, it seems, challenged on the basis that the power utilised under s 60 was engaged for an improper purpose; drug investigation rather than traffic law enforcement. Her Honour observed:

> "Section 60 of the *Police Powers and Responsibilities Act 2000* (the PPRA) permits a police officer to require the person in control of a vehicle to stop that vehicle, inter alia, 'to check whether the vehicle or person is complying with a transport Act' — s 60(3)(b). A transport Act is defined in the dictionary schedule to the PPRA and the dictionary schedule to the *Transport Operations (Road Use Management) Act 1995* (Qld) as including that latter Act, and it is a requirement of that latter Act that a driver be licensed — s 78. There is no requirement that a police officer have any state of mind — such as a reasonable suspicion etc — before exercising a power under s 60(1) and (3)(b) of the PPRA, compare, for example, s 58(1)(b) of the PPRA. Thus, when the police officers pulled Mr Fuentes' car over and checked that he was a licensed driver, they had power to do so which did not depend on their having any reasonable suspicion, or any other state of mind in relation to Mr Fuentes and his passenger. This is a major point of distinction between this case and the case of *R v Rondo*[73] which was relied upon heavily by the applicant Fuentes. In this case there was a proper basis to stop Mr Fuentes' car — cf [4] and [48] of *Rondo*, where there was not. It does not matter to this point that the police officers chose Mr Fuentes' car to stop because they saw two young men in an expensive car. They were not required to have a reasonable suspicion to stop the car under s 60 of the PPRA."[74]

And later:

> "In my opinion the search conducted of the car and backpack was lawful. At the time the car was pulled over there were insufficient grounds for the police to have a reasonable suspicion in order for them to exercise their powers under s 31 (or s 29) of the PPRA. However, by the time the occupants of the car were asked to alight from it there was, in my view, sufficient to justify the use of the detention and search powers. Both officers by then reasonably suspected that there were drugs in the backpack. Constable Lewis allowed for the possibility that there was a weapon in it. That suspicion had been raised because of the apparent nervousness of the occupants of the car and the actions of the passenger in attempting to hide the backpack and refusing to answer Constable Lewis' question

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73 *R v Rondo* (2001) 126 A Crim R 562.

74 At [15]; In *R v Rondo* (2001) 126 A Crim R 562, the statutory provision which bestowed the power prescribed a jurisdictional fact, namely the foundation of a suspicion that there was stolen property in a vehicle to be intercepted.

> about what was in it. Those matters were sufficient basis for both officers to reasonably suspect that there were drugs (or a weapon) in the car, or backpack. Their immediate and focussed enquiries as to exactly that issue when they took Mr Fuentes and his passenger out of the car demonstrate that they genuinely suspected this. As I say, the grounds for the suspicion were reasonable in the circumstances and within the case law as to reasonable suspicion."[75]

In *Police (SA) v Prinse*,[76] Bleby J considered a provision of the *Road Traffic Act* 1961 (SA) which empowered a police officer to intercept a vehicle and ask various questions such as the name and address of the driver, the identity of the owner of the vehicle, the load being carried and the mass of the vehicle. A police officer stopped a vehicle for the purposes of making those inquiries and then noticed the driver showing indicia of alcohol consumption. A roadside breath test was administered and the driver was charged with driving with a prescribed blood alcohol content.

The magistrate held that the intercept was unlawful and excluded relevant evidence. Bleby J, on appeal, held to the contrary. However, in the course of his judgment, his Honour explained:

> "There may be circumstances where it can be shown that the exercise of the powers under s 42 has been carried out capriciously or for an identifiable purpose not connected at all with legitimate policing of the law. In those circumstances, the stopping and what follows may be unlawful."[77]

And:

> "It cannot be presumed, because the exercise of the power under s 42 is not justified in a particular case by reference to a suspicion or belief, that it is exercised for an unlawful purpose. However, if it is quite apparent from the nature of the inquiry made or directions given that the stopping and questioning has no connection whatever with proper policing inquiries but is merely a capricious exercise of the power or an abuse of the power for a purpose irrelevant to law enforcement, then it may well fall into the unlawful category."[78]

And:

> "In my view there was nothing in the evidence which suggested that the exercise by Const Baker of his powers under s 42 of the Road Traffic Act was outside the course of his duty or that it was an improper exercise of his power."[79]

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75 At [24].
76 (1998) 27 MVR 50.
77 At page 54.
78 At page 55.
79 At page 56.

It is clear from the structure of Chapter 2 of the PPRA that ss 29, 30, 31 and 32 are meant for general law enforcement and contain the safeguard of requiring a reasonable and relevant suspicion to be held before the powers there bestowed may be exercised.

Section 60 concerns only traffic enforcement. There are no such safeguards. That general distinction appears in legislation in other jurisdictions and cases have been decided recognising it.[80]

It follows then that if the power bestowed under s 60, being one for traffic enforcement, is used in a particular case for the predominant purpose of investigating criminal offences such as offences against the *Drugs Misuse Act* 1986, then the power has been misused. That then gives rise to the exercise of discretion under the *Bunning v Cross* principles to exclude the evidence obtained as a result of the interception. That will include evidence obtained lawfully in exercise of powers under s 31 based on observations made after the vehicle is intercepted. That will follow because that evidence will be tainted by the initial unlawfulness of intercepting the vehicle. The evidence found during the search will be the "product" of the unlawful interception.[81]

The recent decided cases

Against that analysis, it is appropriate to turn to the two cases.

R v Hinds-Ravet[82]

Two police officers attached to the Logan District Drug and Firearm Team were on patrol in Logan in the early hours of 7 September 2020. While on patrol they saw a white Hyundai car. They conducted a check of the vehicle on the police computer system and identified that it was a hire car. They pulled alongside the vehicle and saw that the driver was Mr Hinds-Ravet. They directed Mr Hinds-Ravet to pull over.

Mr Hinds-Ravet was known to police and known to those particular police. Although he had not been previously found in possession of drugs, he had been intercepted on numerous

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80 *Re Buddee* [2016] NSWDC 422 at [98] and following, *R v Zhang* [2022] NSWDC 457 at [94], *R v Mihajlovic (No 2)* [2019] NSWDC 141 (although the evidence was ultimately not excluded), *R v Large* [2019] NSWDC 627 and *The King v Amital* [2022] NTSC 74.

81 *Bunning v Cross* (1978) 141 CLR 54 at 75.

82 [2022] QSC 66.

occasions and found to be in possession of cash. He had been observed under surveillance as being at various addresses of interest to drug offence investigators.

While the police officer who directed Mr Hinds-Ravet to pull over said that he had a "general suspicion" about drugs, he did not assert that he had a "reasonable suspicion". He did not assert that he acted upon a reasonable suspicion pursuant of s 31 of the PPRA. In fact, he said quite the opposite under cross-examination:

> "At that stage, did you have any suspicion in relation to conducting a search under either section 29 or 31 of the PPRA?---Relating directly to the driver of that vehicle?
>
> The driver of the vehicle or of the car?---No."[83]

Instead, he asserted that he made a decision to intercept the car for a licence check relying upon s 60 of the PPRA.

Once the car was stopped, the police approached it and noticed some cash in the car. The police officer then asserted a reasonable suspicion that there may have been drugs in the car based on:

1. the intelligence about Mr Hinds-Ravet;

2. the fact that the Hyundai was a hire car and the knowledge of police that persons involved with drugs often use hire cars for their illicit activities;

3. that Mr Hinds-Ravet was driving in the very early hours of the morning;

4. there was cash in the car.

Acting then under s 31, Mr Hinds-Ravet was detained and the car was searched and drugs were found. Mr Hinds-Ravet was charged with offences against the *Drugs Misuse Act* 1986. Mr Hinds-Ravet applied to have the evidence discovered in the search excluded in exercise of the *Bunning v Cross* discretion.

The question became whether the interception of the car was lawful. It was common ground that if the interception of the car was not lawful, then a discretion arose to exclude evidence found during the subsequent search.

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83 *R v Hinds-Ravet* [2022] QSC 66 at [20].

The police officer who gave evidence attempted to justify the interception of the vehicle as traffic enforcement so as to rely on the power under s 60. Of course, that was simply untrue. The purpose of the interception was to search for drugs in the car.

The police officer, with his partner, were on patrol looking for evidence of commission of drug offences. He said in his evidence:

> "All right. Now, why was it that you were in Kingston that night?---So part of our duties in the Drug and Crimes Team is to conduct patrols. Obviously the name speaks for itself. So we're targeting drug and crime offences within the Logan district, and part of that is conducting patrols and trying to look - trying to identify offences, people utilising streets or those, you know, transporting drugs and the like."[84]

It was asserted that the interception of the vehicle was to ascertain the identity of the driver. The police officer, in evidence, said:

> "I conducted a check on my QLiTE device of the registration. That identified to me that it was a hire car. I believe it was Crazy Clark's Rentals. At that time I was aware that, offenders involved in drug offences in the Logan district were utilising hire cars. At that time I hadn't - I didn't know who was driving it so I attempted to stop the vehicle to note the licence check, enforcing the Transport Act under the section 60 of the PPRA."[85]

It can be seen that the evidence is internally inconsistent. The police officer is investigating drugs, his suspicion is heightened because the car is a hire car and he knows drug dealers utilise hire cars and he wants to identify the driver, obviously in furtherance of the drug inquiries. However, he then asserts that he "… attempted to stop the vehicle to note the licence check, enforcing the Transport Act under the section 60 of the PPRA".

Under cross-examination, the motivation for the so-called licence check was explored. The police officer's evidence bordered on the ridiculous:

> "Okay. You would've gathered from that that Mr Hinds-Ravet was a man with a licence before you pulled him over?---Licence status changes on a regular basis, so at that time, I wasn't aware of that. I already made that decision to intercept the vehicle.
>
> Sure, but you gathered further information after you've had that decision, as in, the identity, that it was Mr Hinds-Ravet?---Yes.

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84 *R v Hinds-Ravet* [2022] QSC 66 at [19].
85 *R v Hinds-Ravet* [2022] QSC 66 at [19].

> I mean, from all the information that you had about him - fairly recent information - was that he was a man with a licence?---I don't check his licence status on a regular basis.
>
> Right?---So things change with court outcomes and stuff like that - whether they get suspended, and I clearly verbalised to him that I was [indistinct] stop you for a licence check.
>
> But barring an unexpected intervening event, the information you had was that, up until that point, he had a licence?---I didn't know him to be charged with unlicensed driving, is - - -
>
> Oh, exactly. As in there was various interactions which you- would've involved a check of his licence. You were aware of them, and there were no issues arising in relation to his licence status?---It also relates to if he's appropriate to drive that car being a manual or automatic. There's other things that go into that, but predominantly is that - a licence - - -
>
> HIS HONOUR: But that wasn't - - -?--- - - - check, whether they're - - -
>
> That wasn't what you were checking, though, was it?---The licence- sorry, your Honour?
>
> You weren't checking whether he was driving a manual or an automatic car, surely?---Oh, I'm just saying there are the - some other reasons, but I was checking if that driver of that vehicle had a licence, yes. No, I intercepted the vehicle.
>
> MR WILSON: Well, I guess what I'm getting at is: was the licence check a ruse to be able to pull over Mr Hinds-Ravet to interact with him in some way?---No."[86] (emphasis added)

The last question should have been answered "yes".

The case (apparently seriously) put by the police officer was that he and his partner, both members of a squad of police specifically detailed to investigate drug offending, were investigating whether or not Mr Hinds-Ravet had a current driver's licence. Of concern to the drug investigators, apparently, was whether Mr Hinds-Ravet's licence had been recently suspended or cancelled, or whether he was driving a car with a transmission which he wasn't licensed to drive!!

It was found, naturally, that the predominant purpose for intercepting the car was to investigate drugs. The purported use of the power in s 60 was a device to circumvent the restrictions in s 31(1) of the PPRA, namely the formation of the requisite suspicion. The power in s 60 was

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[86] *R v Hinds-Ravet* [2022] QSC 66 at [28].

used for an improper purpose, the interception of the vehicle was improper and that gave rise to a discretionary exclusion of the evidence upon the *Bunning v Cross* principles.

The discretion was exercised in favour of the exclusion of the evidence.

R v Davis[87]

On 13 April 2019, two police officers attached to the Moreton District Tactical Crime Squad were patrolling in an unmarked police car in Dakabin. Mr Davis's car was intercepted. It held Mr Davis and another man. The vehicle was searched. Drugs and other things were located and a number of charges were laid.

An application was made by Mr Davis to exclude the evidence on the basis that the interception of the vehicle was unlawful. It was accepted that in the event that the interception was unlawful, a discretion arose under *Bunning v Cross* to exclude the evidence found in the search.

One of the police officers gave evidence. The other officer had passed away before the application was heard.

The evidence from the police officer was:

1. He and his partner were patrolling Narangba Road at Dakabin because that is a passage used by drug offenders to avoid the highway and therefore detection.

2. He and his partner were on patrol looking for evidence of drug offending.

3. Mr Davis's vehicle was noticed and it was decided to intercept it.

4. The decision was made to intercept the car in reliance upon s 60 of the PPRA. The interception was determined to be in order to conduct a licence check.

5. When the interception was complete and police could see inside the stationary vehicle, a number of things were noticed. At that point:

    (i) police had intelligence that drug offences were being committed at two houses in the vicinity of the interception of Mr Davis's car;

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87 [2023] QSC 112.

(ii) police had intelligence that offenders connected to the two drug houses used Narangba Road as an alternative route rather than the highway;

(iii) the vehicle was travelling at night;

(iv) observation into the car showed that there were loose internal panels. Police experience was that offenders often removed internal panels, concealed drugs and then replaced the panels over the drugs. The continued clipping and unclipping causes a looseness of the panels consistently with what police saw in the applicant's car;

(v) there was an age gap between the driver and the passenger. They were observed not to interact much together and they did not appear to be friends;

(vi) the car contained a lot of rubbish indicating that it may have been lived in;

(vii) conversation with Mr Davis suggested that the applicant was proud of his car but the exterior did not reflect that the car had been well maintained, thus suggesting an unreliability of what was being told to police by Mr Davis.

6. All this founded a suspicion that there were drugs in the car.

7. The vehicle and passengers were detained and searched pursuant to ss 29, 30, 31 and 32 of the PPRA.

In evidence-in-chief, after explaining how the car was intercepted in reliance upon the powers in s 60 and then later searched in reliance on the powers bestowed by ss 31 and 32, the officer said this:

> "Now, this will perhaps sound like a strange question. Where did you learn how to do this?---At the time of this, our officer-in-charge, senior - Senior Sergeant Richard Downey, he and the senior officer within Tac Crime, sort of - the Best Practice method and, sort of, taught us how - of how he wanted his officers to conduct themselves out on the road. And then we'd, I guess, utilise those powers on a daily basis."[88]

Then under cross-examination:

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[88] *R v Hinds-Ravet* [2022] QSC 66 at [35].

> "Okay. All right. Okay. The - you were also asked by the prosecutor how useful licence checks are as an investigative tool, okay, and you told him, 'It's critical'. All right. Remember that?---Yes.
>
> All right. Tell me why it's critical - - -?---In identif - - -
>
> In terms of investigating drug offences?---It identifies that person.
>
> Yeah. All right. So is this a fair enough - and I'm not saying there's anything unusual about what you did. I'm not making any comment on that at all, okay. The - one standard procedure when you or other police are out on the lookout for drug offenders is to - for whatever reason, a car becomes of interest and you stop the car to identify who the driver and the passengers are; correct? Am I right so far?---Correct.
>
> All right. And, at that point in time, that opens the potential door to suspicion about whether there are any drugs in the car or drug offences connected to the car; correct?---Correct.
>
> All right. Okay. The - and that's exactly what you were doing that night - and I'll summarise it. You were out looking for - doing a proactive patrolling, looking for drug offenders in the area. You see a car that, for whatever reason, you decide is worthwhile stopping and finding out what's going on. You stopped the car. You give the driver's licence to your partner, who does the check, and then he brings up the information that, at least for him, is enough to do a search of the car. Is that what happened?---Correct."[89]

And then later:

> "The reality is that the licence check was, on that night, and is used, on occasion, as the - what I'll call the key to finding out whether the person connected - that's sitting in that driver's seat is connected with drug offending?---Correct."[90]

And later:

> "You're, obviously, versed in the powers vested in you as a sworn police officer under the PPRA?---Yes, your Honour.
>
> Yes. And you would be aware of section 31, which talks about searching vehicles without warrant?---Yes, your Honour.
>
> And that says:
>
> > *A police officer who reasonably suspects any of the prescribed circumstances for searching a vehicle without a warrant exists -*
>
> and one of those is a reasonable suspicion that there's drugs in the car?---Yes, your Honour.

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89 *R v Hinds-Ravet* [2022] QSC 66 at [33].
90 *R v Hinds-Ravet* [2022] QSC 66 at [33].

Continuing:

May, without warrant, do any of the following.

And the first is:

Stop a vehicle.

?---Yes, your Honour.

Right. so you're aware of all that?---Yes.

You didn't go under section 31. You instead went under section 60, which is stopping the vehicle for a licence check?---Yes, your Honour.

Right. You mentioned earlier that you'd received advice to go under section 30 from your superiors - I beg your pardon, under section 60?---Yes, your Honour.

Right. The reason for that is, is it, that - you go under section 60, rather than section 31, is because you don't have to have any reasonable suspicion to pull over a car for a licence check; is that right?---Correct.

Right. So even when you're investigating drugs, you can pull over a car under section 60 without forming the reasonable suspicion under 31?---Correct.

And that's why you adopt - and I'm not just saying you, but police adopt the procedure under section 60, rather than 31?---I believe so."[91]

It was found that the assertion by the police officer that he intercepted the vehicle pursuant to s 60 was wrong, but that the police officer was honest in his evidence. He was just misinformed by his superiors.

It was found that the interception of the car was not effected for the purposes of traffic enforcement but to investigate the commission of drug offences. It followed then that the power bestowed by s 60 was misused. There was no attempt to justify the interception by satisfaction of the jurisdictional fact identified in s 31. The search was therefore unlawful. All the evidence was excluded.

Conclusion

In *R v Fuentes*,[92] it appears from the reported judgment that the wrong point was argued. What was submitted in *Fuentes* was that some reasonable suspicion of commission of a traffic offence needed to be held by an officer before the officer could exercise the power of

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91 *R v Hinds-Ravet* [2022] QSC 66 at [34].

92 (2012) 230 A Crim R 379.

interception bestowed by s 60 of the PPRA. That submission was, in my respectful view, rightly rejected. As observed by Justice Dalton, who decided *Fuentes*, there is no such jurisdictional fact which exists as a prerequisite to the exercise of the power bestowed by s 60.

However, by the express terms of s 60 of the PPRA, the power of interception could only be used for a "prescribed purpose", relevantly, enforcement of a Transport Act. Whether the power was, or was not exercised for that purpose is a fact to be determined upon consideration of the motivation of the police officer exercising the power.

That was the point taken in both *R v Hinds-Ravet* and *R v Davis*. In both those cases, it was established, as a fact, that the interception pursuant to s 60 of the PPRA was not effected for one of the prescribed purposes for which that power was granted. The police officers in neither of the two cases were intercepting vehicles to ascertain whether the drivers were licensed. They intercepted the vehicles for the purposes of drug investigation. It followed that the power bestowed by s 60 had been misused and the *Bunning v Cross* discretion arose.

R v Fuentes, *R v Hinds-Ravet* and *R v Davis* demonstrate how critical it is to properly construe any section granting a power so as to understand the limits of the power and any preconditions attaching to its deployment.