



# ‘Somethin’ ain’t right’

THE IMPROPER USE OF  
POLICE POWERS FOR  
ULTERIOR PURPOSES

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*“There is no doubt that a lot of crime could be proactively prevented simply by providing the police with the power to interfere with every citizen on every occasion in every place, to allow them to arbitrarily stop and search anyone on a hunch or a suspicion. **That is not a power they now have and such a power is antithetical to any free society.**”*

– McClintock DCJ, *R v Buddee* [2016] NSWDC 422 at [115] (emphasis added)

*“Personal liberty is 'the most elementary and important of all common law rights.' Critical to its preservation is that 'the circumstances in which a police officer may, without judicial warrant, arrest or detain an individual should be strictly confined, plainly stated and readily ascertainable’.”*

– Gageler J, *Prior v Mole* [2017] HCA 10 at [22] (dissent)

# What are we talking about?

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- The improper use of police powers for ulterior purposes – e.g. the use of police traffic powers as a ‘ruse’ to conduct general criminal investigation of a vehicle
- Why does this matter?
  - Police powers infringe upon fundamental rights and freedoms – freedom of movement, personal liberty, right to privacy and the right to property
  - Police should only use powers for the purpose conferred by parliament – i.e. a *bona fide* exercise of the power (parliament intended to delineate traffic powers from general criminal investigation powers)
  - Potential for abuse of police powers, as cases illuminate, if not closely monitored
  - Often the only mechanism of accountability is the Court

# What are we talking about?

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- This issue has been considered in jurisdictions across Australia in the context of excluding evidence:
  - *Buddee, Large, Kovac* and others (NSW)
  - *Gehan and Amital* (NT)
  - *Davis* (Qld)
  - *Tram* (SA)
- Practical tips
- Questions

It is well-established that a statutory power must be exercised *bona fide* for the purpose for which it was conferred by Parliament

*“... it is incumbent upon the public authority in whom the discretion is vested not only to enter upon the consideration of applications for its exercise but to decide them bona fide and not with a view of achieving ends or objects outside the purpose for which the discretion is conferred.”*

– *Swan Hill Corporation v Bradbury* [1937] HCA 15

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*“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.”*

– *O’Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1

# It begins with *Buddee*....

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*“I’ve completed a check on your driver’s licence and it’s all good, however I just want to ask you about these photo frames, who owns these photo frames of Scarface?”*

*R v Buddee at [14]*



# Facts

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- Police pull a car over for 'the purpose of an RBT stop' at 4.10pm in Merrylands
- Police conduct background checks on driver and passenger. Passenger had a prior for drug possession that was relayed to officers at the scene
- During the interaction with the driver, police notice Scarface memorabilia inside the vehicle
- Police ask the driver 'is there anything in the car that shouldn't be?'
- Driver then says that she has an ice pipe
- Police then search the vehicle and find methamphetamine (6.76 grams)



# Voir dire

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- Defence applied to exclude evidence under s 138 of the *Evidence Act*
- Objection particularised on several grounds including:

*Even if the police were initially acting within a lawfully conferred power or authority to stop the vehicle, their conduct became unlawful or improper when they used the random breath test power for an ulterior purpose of conducting a criminal investigation into the occupants which was not otherwise authorised at law, particularly the Law Enforcement (Powers and Responsibilities) Act 2002 (“LEPRA”).*

- All 4 police officers involved gave evidence and were cross-examined on the voir dire
- Primary officer (Embleton) gave sworn evidence that he conducted an RBT using an alcolizer – however this was not recorded in any of the contemporaneous notes ...

Contemporaneous records did not reflect that an RBT had been conducted – mention of ‘vehicle of interest/person of interest stop’ in contemporaneous records suggestive of ulterior purpose

*[34] There is simply no reference in any contemporary material produced to the stopping being for an RBT. There is no reference in any contemporaneous material to a breath test actually being administered.*

*[35] In Constable Jones’ diary the incident is described as: “Person of interest Bassari Kalil, date of birth address, location Desmond Street, Merrylands re **vehicle of interest/person of interest stop**, vehicle of interest stopped above, person of interest in passenger seat of vehicle of interest. Driver Michelle Buddee. Vehicle of interest searched ....*

*[36] Despite the existence of recording sheets for RBTs and a mechanism to do so, **no record of any kind was apparently created concerning the stopping for an RBT or the administration of an RBT.***

Common problem for defence practitioners – when the issue is raised in advance of the voir dire, it allows police an opportunity to try and ‘fix their case’

*[48] Despite the fact that no one mentioned conducting a RBT on Michelle Buddee in any contemporaneous notes, when the issue arose in the next year - when the legality of the stop was obviously an issue and requisitions were issued – each officer could recall Embleton carrying a RBT device or some other corroborating details. Given the other evidence of the officers about the purported number of RBT stops that they conducted as part of their general duties, this claim seems very difficult to believe.*

*[49] I regard this evidence as being inconsistent with the earlier statements and notes and unlikely to be accurate or a memory and, at best, it must be a reconstruction.*

# Findings

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- HH rejected officers' account of what occurred ('unreliable, fractured and incomplete')
- Evidence of RBT stop was inconsistent with contemporaneous records: 'It was substantially an account reconstructed to retrospectively justify the stop and the detention' (at [81])
- 'The totality of the evidence inevitably leads to the conclusion that the road safety power to pull people over randomly for a breath test was in fact being selectively relied upon to pull people over on a **hunch or mere suspicion that they might be involved in crime**. I am satisfied that this was occurring.' (at [81])
- The RBT power was being used as a 'ruse' to conduct general criminal investigation; this was not an 'RBT' but rather an 'RCT' – 'Random Crime Stop'

# Statements of principle

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- Purpose of RBT powers is maintenance of road safety and licensing system
- Principle of legality applies to interpretation of RBT powers – *Coco v The Queen* ('clear expression of an unmistakable and unambiguous intention to abrogate freedoms')
- RBT power is an intrusion upon freedom of movement and personal liberty – it must be exercised in a *bona fide* manner:

*[89] The powers of the individual and the State are not to be exactly equated. It is wrong to equate the same principle pertaining to private individuals - that they may do everything which is not specifically forbidden - with the powers of police officers where the opposite is true. Any action they take must be justified by law, they must be able to point to lawful authority for all actions undertaken. **They must act in a bona fide exercise of a power and not for an ulterior purpose.***

# Statements of principle (cont.)

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*[104] Applying these principles, it is clear that Parliament intended to distinguish motor traffic powers from criminal investigation powers. The random nature of the motor traffic powers is a very significant interference in the liberties of citizens lawfully going about their business. They are not part of the criminal investigation powers conferred by LEPR. There was a clear intention to delineate powers based on suspicion of the commission of crime from powers directed primarily at ensuring road safety and proactively preventing driving over the prescribed content of alcohol.*

*[105] The authorities and statutory interpretation all point to the proposition that the RBT powers cannot be used to justify the arbitrary stopping of vehicles, interrogating of occupants or searching of vehicles for crime detection.*

# Outcome

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- Evidence of methamphetamine found to be obtained illegally and improperly
- HH found multiple illegalities and improprieties ('illegal stopping, illegal interrogation, illegal detention and improper questioning')
- Evidence excluded under s 138

# Who got the last laugh?

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# Impact of *Buddee*

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- Various NSW District Court decisions since: *R v El-Kahil (No. 1)* [2022] NSWDC 606; *R v Yongcheng Zhang* [2022] NSWDC 457; *Winikerei v The Queen* [2022] NSWDC 250; *R v Kovac* [2021] NSWDC 85; *R v Large* [2019] NSWDC 627; *R v Mihajlovic (No 2)* [2019] NSWDC 141
- *R v Amital* [2022] NTSC 74 – cited with approval
- *R v Davis* [2023] QSC 112 – cited with approval
- Reasoning implicit in *R v Gehan* [2019] NTSC 91, *Babui v O’Neill* [2020] NTSC 50 and *R v Tram* [2023] SADC 105
- Note: this issue does not yet appear to have been litigated in Victoria – while *Kaba* considered important issues relating to the scope of police powers to stop a vehicle, it did not consider whether the stop was conducted for an ulterior purpose

# *R v Gehan* [2019] NTSC 91

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- First NT decision to consider lawfulness of ulterior use of police powers
- Since followed by *The King v Amital* [2022] NTSC 74; *R v Ireland* [2020] NTSC 47 and *R v Casimiro and R v Pinto* [2020] NTSC 18 and others
- Considers the tension between police experience vs prejudice and profiling
- Grant CJ stated that '[t]he use of the power to conduct a random breath test for the ulterior purpose of general criminal investigation would be **both improper and in contravention of the law which confers the power**' (at [11])
- HH also undertook a comprehensive analysis of the authorities in relation to what constitutes reasonable grounds to justify a search by police

# Facts

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- Gehan boarded a flight in Brisbane bound for Darwin (what is commonly referred to as a 'red-eye flight')
- Gehan landed at Darwin airport at 12.50am
- He disembarked the aircraft and exited the terminal without collecting any baggage
- He had a 'dishevelled' appearance and was wearing Australian flag board shorts and a long-sleeved checked shirt (a 'flannie')
- He caught the eye of one AFP officer (SC Tomic) both for wearing strange clothing for the Darwin climate and for not collecting any baggage

# Facts (cont.)

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- Gehan was met by an associate driving a blue Mazda motor vehicle, he entered the vehicle and his associate drove away from the terminal building toward Henry Wrigley Drive
- A second AFP officer (SC Peberdy) who was on duty with the SC Tomic (the first officer) noticed the blue Mazda before it left the terminal pick-up area and decided to follow it with the intention of conducting a traffic stop
- SC Peberdy and SC Tomic stopped the vehicle on Henry Wrigley Drive approximately 400 metres from the terminal building
- They conducted a random breath test which returned a negative result
- They then conducted a s 120C PAA drug search and located two packages containing 96.73 grams of methamphetamine strapped to Gehan's armpits

# PROMIS records

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PROMIS (police database) entry made after the accused's arrest. That entry states:

*'AFP Members PEBERDY//TOMIC report **observing suspicious male arrived from TT 652 from Brisbane.***

*POI observed to depart the terminal in MV CD32TI*

*ACTIONS:*

*0102 TRAP conducted for RBT on Henry Wrigley drive...'*

# Voir dire – defence argument

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- Argument 1: The stop and search of the vehicle was improper because it involved police using the RBT power for the ulterior purpose of investigating the accused for suspected drug offending (genesis for this argument was the NSW decision of *Buddee*)
- The defence argued that the police had formed a suspicion of Gehan when:
  - Police initially observed him disembarking from the plane (his 'dishevelled' appearance)
  - Police then followed him through the terminal (saw that he didn't collect any luggage) and outside; and
  - Police then apprehended the vehicle he was travelling in on the pretext of conducting an RBT when the real purpose was to investigate their suspicions for drug trafficking

# Evidence on voir dire

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- Remember the way a voir dire operates: the onus is on defence to establish facts to support the ulterior purpose contention (SOP = BOP per s 142)
- SC Tomic's evidence on voir dire:
  - He first saw Gehan inside the terminal building after he had disembarked from the Brisbane flight (Tomic was standing near the gate observing passengers disembark)
  - Gehan had a “dishevelled” appearance and was wearing a long-sleeved checked shirt
  - Although Gehan caught Tomic's eye, Tomic did not at that stage harbour a suspicion that the accused was involved in drug-related offending
  - Tomic observed Gehan leave the terminal building without collecting baggage, which did arouse some suspicion

# Evidence on voir dire

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- SC Tomic's evidence continued....
- Tomic said that neither he nor Peberdy followed Gehan outside, and that he did not see the accused waiting at the public pickup area or getting into the vehicle
- As the Brisbane flight was the last flight of the night, Tomic and Peberdy went to their police vehicle, which was parked immediately outside the terminal building, with the intention of conducting a brief patrol around the airport area before going back to the AFP office
- Peberdy drove and during the course of that patrol Peberdy “made the decision to pull over the vehicle” for the purpose of conducting a random breath test
- “It was at that time that Tomic first saw that the accused was a passenger in the vehicle and recognised him as a person he had observed in the terminal building”



# Evidence on voir dire

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- SC Peberdy's evidence was that he made the decision to follow the Mazda vehicle with the intention of conducting an RBT stop, having regard to a number of matters:
  - He saw two males in the Mazda
  - The Mazda was old and in poor condition
  - The Mazda accelerated away from the pickup point more quickly than vehicles ordinarily did in those circumstances; and
  - Experience had shown a relatively high incidence of drivers coming to pick up passengers from late-night flights while under the influence of alcohol

# Findings

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- Grant CJ held that defence had **not** established that the RBT power had been used for an ulterior purpose

*[27] 'Having regard to the circumstances in which the [PROMIS] entry was made, and to my assessment of Peberdy's reliability as a witness, I accept the explanations given by him concerning the formulation and content of the PROMIS entry. It was a document compiled in hindsight and constituted an ex post facto summary of the circumstances of the accused's arrest. While it contains certain assumptions and ex facie inaccuracies, they are not of a type which cause me to reject the evidence given by Tomic and Peberdy in relation to the circumstances in which, and the purposes for which, the vehicle was initially apprehended. I make that finding having due regard to the importance of contemporaneous documentary evidence, and to the fact that such evidence may in some circumstances obviate "the fallibility of human assessment of credibility from appearances".'*

# Statements of principle

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- However, Grant CJ accepted the contention that the use of the RBT power for the purpose of criminal investigation (for other types of offences) would be both **improper and unlawful**:

*[11] ‘... The [RBT] power is conferred for the purpose of road safety and the detection of offences against the Traffic Act, and in particular the offences of driving under the influence of alcohol or a prohibited drug. **There is a clear delineation between powers conferred for that purpose and powers conferred for the criminal investigation of other types of offence.** That delineation is apparent from the source and text of the provisions conferring the different powers, and the differing requirements which condition their exercise. **The use of the power to conduct a random breath test for the ulterior purpose of general criminal investigation would be both improper and in contravention of the law which confers the power.**’*

# *R v Amital* [2022] NTSC 74

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- Decision of Blokland J – HH considers *Buddee* and cites with approval (at [116]-[117])
- Police pull a car over for an RBT at Adelaide River (about 1 hour south of Darwin) at 11.30pm
- Driver returns negative alcohol and drug result. Driver questioned about destination and tells police he is heading to ‘Port Keats’ which is an alcohol restricted area about 291km away. Occupants of vehicle also questioned.
- Police then decide to search vehicle, initially under the *Liquor Act*, but after vehicle pulled over to verge and occupants were questioned further, police then decide to search under drug search power in *Police Administration Act*. During search they found cannabis (400g)
- Defence challenged search – arguing (among others) that police used the *Liquor Act* search power for the ulterior purpose of investigating suspicions around drug offending (note: it was not in dispute that initial RBT stop was lawful)

[62] In terms of an approach to the construction of a statutory provision such as s 238 [of the Liquor Act], it is **important to bear in mind that a random search represents an intrusion into common law or basic rights, consequently such a provision should be read or construed strictly.** To subject a person or their property including as here, a car containing personal items, to detention or a search represents a general interference with those rights. In *Babui v O'Neill*, 70 Grant CJ said an interference by way of search of a person **requires “scrupulous observance” of the conditions imposed on the exercise of the power.** The exercise of the power on this occasion under ss 238-239 of the Liquor Act resulted not only in the search of some of the occupants but also detention of all occupants and the car. Those actions are clear intrusions into basic rights.

*[115] It was an error to rely on the Liquor Act powers to apprehend and detain. During the period of detention assumed to be under the Liquor Act, Sergeant Bradshaw commenced investigation for cannabis offences and pursued the investigation until he had reasonable grounds under the Police Administration Act. He agreed there was no power to conduct a criminal investigation under s 238 of the Liquor Act.*

....

*[117] After reviewing further authorities it was said [in Buddee] that the RBT powers cannot be used to justify the arbitrary stopping of vehicles, interrogating occupants or searching vehicles for crime detection. I draw a similar conclusion here. Liquor Act powers of random search cannot be used to interrogate occupants or search cars for crime detection.*

....

*[121] It is concluded here, police did not have authority when acting under the Liquor Act to ask investigative questions in order to build a suspicion for another offence.*

# Outcome

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- Evidence excluded under s 138
- Importantly Blokland J found that there was no power to conduct a *Liquor Act* search after the RBT had concluded, as the *Liquor Act* search power was only enlivened if ‘a forfeiture offence was committed, is being committed or is about to be committed’ – and given that the vehicle was 291km away from its intended destination, it could not be said the forfeiture offence was ‘about to be committed’
- Therefore, HH found that it was unlawful for police to detain the vehicle after the RBT had concluded – and all evidence obtained in consequence was excluded

# *R v Davis* [2023] QSC 112

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- Decision of Davis J – HH cited with approval *Buddee* and *Amital*
- Police pulled over vehicle to conduct a ‘licence check’ (which is an authorised ‘prescribed purpose’ to stop a vehicle in Queensland under s 60 of the PPRA)
- Vehicle searched and methamphetamine located (20 grams). Evidence challenged on voir dire – 2 police officers were cross-examined.

*[39] I find that the two police officers were on patrol specifically targeting drug offenders. They intercepted the applicant’s car in order to investigate the possibility that the occupants of the car were offending against the Drugs Misuse Act 1986. The police officers did that by intercepting the car and identifying the driver so as to then investigate whether there was sufficient suspicion to search the car for drugs pursuant to s 31 of the PPRA. Their interest in the licence status of the applicant was only a step in the investigation of the possible drug offences.*



*[74] The inference I draw from the evidence is that senior police have instructed that when investigating possible drug offences, police should exercise powers under s 60 of the PPRA in order to intercept motor vehicles rather than s 31. This is to avoid the necessity to form a reasonable suspicion that drugs are in the vehicle sought to be intercepted as a precondition to the right to stop it.*

*[75] The effect of such a direction is that the power vested by s 60 for the purposes of the investigation of traffic offences is being systematically misused so as to avoid the specific safeguards which have been put in place in relation to the exercise of powers for the investigation of drug offences.*

*[76] It is in the public interest to denounce the conduct of police in deliberately misusing statutorily vested powers. In my view, that consideration outweighs the interest of the public in seeing the applicant prosecuted for what are obviously fairly serious offences.*

*[77] The evidence should be excluded.*

# *R v Tram* [2023] SADC 105

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*[131] It can again be seen that s 40V merely confers a power to direct a driver of a vehicle to give the officer their personal details. The failure to comply with a direction under s 40V sounds in liability to a fine not exceeding \$5,000. The section does not in its terms authorise a police officer to detain a vehicle or a person in order to give a direction ... **A police officer cannot call in aid s 40V in order to stop and detain a person so that they may conduct general investigations. That would not be a bona fide exercise of the power conferred by s 40V.***

# Practical tips – preliminary assessment

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- Initial assessment - does the evidence suggest that 'something isn't right'
- Discovery – seek disclosure of all contemporaneous records:
  - BWC footage – particularly useful
  - Handbook / diary notes of police officers involved;
  - COPS/INTERPOSE/LEAP/PROMIS entries
  - Police radio recordings, mobile data checks etc
- Look for inconsistencies in the accounts given by the officers at the scene
- Look for inconsistencies in the contemporaneous records – if the officers made a police radio call, what did they ask for? If background checks were conducted, what for?
- Were the police officers conducting 'proactive crime' duties – generally a strong indicia

# Practical tips – actions at the scene

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- Closely examine the actions of police at the scene:
  - Look for coordinated positioning of officers around the vehicle
  - Look for coordinated interrogation of the driver and passenger(s)
  - Were the driver and passengers required to identify themselves? Why? Were background checks on the occupants carried out? Why?
  - If police are relying on an RBT stop, were other RBTs being conducted by the officer?
  - Were the occupants required to remain at the scene while those checks were being carried out?
- The above factors, particularly in combination, can be strong indicia that the stop is for an ulterior purpose

# Practical tips – voir dire

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- Forensic decision making for the voir dire
- Improper or unlawful? What is your basis to exclude? What is the police power in issue?
- Know your exclusionary provisions: ss 138, 137 and 135 of the *Evidence Act / ENULA*
- Which witnesses do you want to XN at the voir dire?
- Tipping off police witnesses in advance so they can fix their case – BIG PROBLEM!
- Difficulties of cross-examining ‘experienced’ police witnesses
- Practical difficulties of persuading a court to make adverse findings against police witnesses

# Questions?

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