CITATION:	*The Queen v Gehan* [2019] NTSC 91
PARTIES:	THE QUEEN
	v
	GEHAN, Kade Nathan
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY exercising Territory jurisdiction
FILE NO:	21913283
DELIVERED ON:	31 December 2019
DELIVERED AT:	Darwin
HEARING DATE:	19 and 20 December 2019
JUDGMENT OF:	Grant CJ

CATCHWORDS:

EVIDENCE – Discretions – Exclusion of evidence – Criminal proceedings – Improperly or illegally obtained evidence

Whether stop and search of vehicle improper – Police used power to stop for purpose of random breath test – Whether power used for ulterior purpose of investigating suspicion that accused involved in drug offending – No ulterior purpose established – Whether search of vehicle and occupants unlawful – Whether police had reasonable grounds to suspect that a dangerous drug might be found in the vehicle – Information and circumstances in combination constituted reasonable grounds to suspect the presence of dangerous drugs in the vehicle – Evidence not excluded.

Evidence (National Uniform Legislation) Act (NT) s 138, s 142
Misuse of Drugs Act 1990 (NT) s 7
Motor Vehicles Act 1949 (NT) s 113
Police Administration Act 1978 (NT) s 120C
Traffic Act 1987 (NT) s 29AAB

Forrester v Mattson [2016] NTSC 16, *George v Rockett* (1990) 170 CLR 104, *Hussien v Chong Fook Kam* [1970] AC 942, *Murray, Hale and Olsen (Pseudonyms) v The Queen* [2017] VSCA 236, *Nicholas v Cann* [2018] NTSC 83, *O'Connor v R* (Unreported, District Court of New South Wales, 12 August 2010), *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494, *Police v Beck* (2001) 79 SASR 98, *Prior v Mole* (2017) 261 CLR 265, *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, *R v MacKenzie* [2013] 3 SCR 250, *R v Nguyen* (2013) 117 SASR 432, *R v Rondo* (2001) 126 A Crim R 562, *Ridgeway v The Queen* (1995) 184 CLR 19, *Rigby v Mulhall* [2019] NTSC 70, *Robinson v Woolworths Ltd* (2005) 158 A Crim R 546, *State of Western Australia v Texeira* [2017] WADC 31, *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306, *The Queen v Grosvenor* [2014] NTSC 49, *Walsh v Loughnan* [1991] 2 VR 351, *Zoric v Police* [2006] SASC 355, referred to.

REPRESENTATION:

Counsel:

Prosecution:	J Ibbotson
Accused:	J Razi and G Chipkin

Solicitors:

Prosecution:	Office of the Director of Public Prosecutions
Accused:	North Australian Aboriginal Justice Agency

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Gehan [2019] NTSC 91
No. 21913283

BETWEEN:

THE QUEEN
Plaintiff

AND:

KADE NATHAN GEHAN
Defendant

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 31 December 2019)

[1] The accused is charged with one count of possessing a commercial quantity of methamphetamine contrary to s 7 of the *Misuse of Drugs Act 1990* (NT). The maximum penalty for that offence is imprisonment for 25 years.

[2] The Crown alleges that on 31 March 2019 the accused boarded a Tiger Airways flight in Brisbane bound for Darwin. He arrived in Darwin at 12.50 am on 1 April 2018, disembarked the aircraft and exited the terminal without collecting any baggage. He was met by an associate driving a blue Mazda motor vehicle. The accused entered the vehicle and his associate drove away from the terminal building.

[3] The vehicle was stopped by two Australian Federal Police officers on Henry Wrigley Drive approximately 400 metres from the terminal building. Both police officers also held appointment as Special Constables with all the duties, obligations, powers and privileges imposed or conferred on members of the Northern Territory Police Force under any law in force in the Territory.

[4] The purpose of the traffic apprehension was to conduct a random breath test on the driver in the exercise of the power conferred by s 29AAB of the *Traffic Act 1987* (NT). That test returned a negative result. A check conducted during the course of the stop disclosed that the vehicle was unregistered and uninsured and that the driver was unlicensed. A further check on the driver showed that he had a conviction in 2018 for possessing a trafficable quantity of a Schedule 1 drug in a public place. The apprehending police officers also observed that the accused and his associate appeared nervous, and that the accused appeared to be under the influence of an intoxicating substance.

[5] Police then searched the vehicle and its occupants in the exercise of the power conferred by s 120C of the *Police Administration Act 1978* (NT). In the course of that search they located two packages taped under the accused's armpits. Subsequent analysis showed that those packages contained methamphetamine in the total weight of 96.73 grams.

The accused's objection

[6] The accused contends that all evidence obtained as a consequence of the stop and search of the vehicle and its occupants should be excluded pursuant to s 138 of the *Evidence (National Uniform Legislation) Act 2011* (NT) (**the *ENULA***). The grounds of objection are:

(a) that the stop and search of the vehicle was improper because it involved police using the power to stop the vehicle for the purposes of a random breath test for the ulterior purpose of investigating the suspicion that the accused was involved in drug offending; and, or in the alternative

(b) that the search of the vehicle and its occupants was unlawful because police had no reasonable grounds to suspect that a dangerous drug might be found in the vehicle.

The operation of s 138 of the *ENULA*

[7] Section 138(1) of the *ENULA* provides:

> **Exclusion of improperly or illegally obtained evidence**
>
> (1) Evidence that was obtained:
>
> (a) improperly or in contravention of an Australian law; or
>
> (b) in consequence of an impropriety or of a contravention of an Australian law;
>
> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

[8] The *ENULA* contains no definition of "impropriety". The method or conduct will be “improper” in the relevant sense if it is “not in accordance with truth, fact, reason or rule; abnormal, irregular; incorrect, inaccurate, erroneous, wrong”.[1] The meaning of the term "improperly" was described by Basten JA in *Robinson v Woolworths Ltd* in the following terms:[2]

> It follows that the identification of impropriety requires attention to the following propositions. First, it is necessary to identify what, in a particular context, may be viewed as "the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement". Secondly, the conduct in question must not merely blur or contravene those standards in some minor respect; it must be "quite inconsistent with" or "clearly inconsistent with" those standards.

[9] As suggested in that extract, the test is not materially different to the common law position that in order to warrant the exclusion of evidence on this basis the conduct in question must be "inconsistent with the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement".[3] Moreover, that conduct must be “clearly inconsistent” with those standards. Although the method or conduct in question need not have been intentionally improper, it must still be capable of characterisation as clearly and significantly inconsistent with minimum standards.

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1 *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 at [29] per French CJ.

2 *Robinson v Woolworths Ltd* (2005) 158 A Crim R 546 at [23].

3 *Ridgeway v The Queen* (1995) 184 CLR 19 at 36 per Mason CJ, Deane and Dawson JJ.

The apprehension of the vehicle

[10] Section 29AAB(1) of the *Traffic Act* provides:

> A police officer may direct the driver of a motor vehicle to pull over, without reasonable suspicion the driver has committed an offence, for one or both of the following purposes:
>
> (a) to require the driver to submit to a breath test to determine whether there is alcohol in the driver's breath;
>
> (b) to require the driver to submit to a saliva test to determine whether there is a prohibited drug in the driver's body.

[11] That power may be exercised without the need for reasonable suspicion on the part of police, but is limited to the purpose of requiring the driver to submit to a breath test and/or saliva test. The 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.

[12] The accused's contention that the power was used for an ulterior purpose on this occasion is made on the basis that the police officers

formed a suspicion that he was involved in drug-related offending when they first observed him in the airport terminal building; that they observed the accused getting into the vehicle at the passenger pickup point; and that they then apprehended the vehicle on the pretext of conducting a random breath test when the real purpose was to investigate their suspicions.

[13] That contention is based largely on a PROMIS 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

[14] In that entry, "POI" is an acronym for a person of interest; "TRAP" is the designation for a traffic apprehension, and "RBT" is an acronym for a random breath test.

[15] One can understand why, on a reading of the PROMIS entry in isolation, defence counsel might conceive that the apprehending police officers had formed a suspicion concerning the accused in the airport terminal, had actively followed him from the terminal to the vehicle pickup point, and had stopped the vehicle in order to explore those suspicions. However, when considered in conjunction with the evidence given by the apprehending police officers during the course of

the *voir dire* hearing, I am unable to find that the PROMIS entry sustains that conclusion on the balance of probabilities.[4]

[16] The apprehending officers were Senior Constable Tomic (**Tomic**) and Senior Constable Peberdy (**Peberdy**). Tomic's evidence was comprised by the statutory declaration which he made on 10 April 2010 following the arrest of the accused, and the cross-examination by counsel for the accused during the course of the *voir dire* hearing. So far as is relevant to the determination of this first ground of challenge, Tomic's evidence was that he saw the accused in the terminal building after he had disembarked from the Brisbane flight. Tomic's observation at that time was that the accused had a "dishevelled" appearance and was wearing Australian flag board shorts and a long-sleeved checked shirt. Although the accused caught Tomic's eye, he did not at that stage harbour a suspicion that the accused was involved in drug-related offending. Tomic's recollection is that the accused then left the terminal building without collecting baggage, which did arouse some suspicion.

[17] Tomic says that neither he nor Peberdy followed the accused 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

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4 The burden is on the party seeking exclusion of the evidence to establish that it was improperly obtained: see *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 at [28] per French CJ. To find that the facts necessary for deciding the question whether the evidence should be admitted or not admitted have been proved, the court is required to be satisfied on the balance of probabilities: *ENULA*, s 142.

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 he pulled over the vehicle for the purpose of conducting a random breath test.

[18] Peberdy made the decision to pull the vehicle over, and Tomic did not recall whether they had any conversation about the matter before Peberdy did so or whether Peberdy told him why he was pulling the vehicle over. Tomic said he had first seen the vehicle as it came through the boom gate exit from the short-term car park. Tomic was unaware at that stage that the accused was a passenger in the vehicle. Once the vehicle had stopped, Peberdy advised AFP Communications of the vehicle's registration number and then approached the driver's side window of the vehicle and spoke to the driver. While he was doing so, Tomic received advice from AFP Communications that the vehicle's registration had expired on 25 December 2018. He advised Peberdy of that matter, and then approached the passenger side of the vehicle. 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.

[19] Tomic was questioned about the relevant part of the PROMIS entry. His evidence was that Peberdy had made the entry. He accepted that

the description in the case entry was on its face different to the account he had given in his evidence, in that it suggested that he and Peberdy had followed the accused from the terminal building and had observed him getting to the vehicle. Tomic said that while the case entry suggested that was so, that was not what had happened in fact and the traffic apprehension was not used as a ploy to investigate a suspicion of drug-related offending.

[20] Peberdy's evidence was also comprised by the statutory declaration which he made on 10 April 2010 following the arrest of the accused, and the cross-examination by counsel for the accused during the course of the *voir dire* hearing. So far as is relevant to the determination of this first ground of challenge, Peberdy's evidence was that at about 1 am on the morning in question, after the last flight for the night had arrived, he and Tomic had returned to the police vehicle for the purpose of conducting a patrol around the airport precinct. He observed two males in a blue Mazda vehicle drive away from the passenger pickup point outside the airport terminal. He had not previously seen either of those persons in the airport terminal; or at least neither of them had come to his attention when he had been observing passengers in the terminal building.

[21] Peberdy made the decision to follow the vehicle with the intention of conducting a traffic stop. He made the decision having regard to a number of matters. He saw two males in the vehicle; the vehicle was

old and in poor condition; the vehicle 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. Peberdy's recollection is that he told Tomic that he wanted to pull the vehicle over for the purpose of conducting a breath test.

[22] Peberdy followed the vehicle along Henry Wrigley Drive, activated the red and blue warning lights on the police vehicle, and directed the vehicle to stop for the purpose of performing a random breath test on the driver. Before Peberdy got out of the police vehicle he notified AFP Communications of the vehicle's registration number. He then approached the vehicle and informed the driver that he had been stopped for purposes of a random breath test. The test returned a negative result.

[23] Tomic then informed Peberdy that the vehicle was unregistered. Peberdy asked the driver if he had a licence, and the driver replied that it had expired. Peberdy then conducted further checks which confirmed that the driver did not hold a licence and disclosed that he had a recent conviction for the possession of a trafficable quantity of a Schedule 1 drug. Peberdy then had a brief conversation with Tomic at the rear of the vehicle during which Tomic informed him that he had observed the passenger in the vehicle arriving on the Brisbane flight

some time earlier. That was the first time at which Peberdy became aware of that matter.

[24] Peberdy was also cross-examined about the PROMIS entry. He confirmed that he had made the entry. His evidence was that it was made after the arrest and processing of the accused, and at the end of a long shift. Peberdy's statutory declaration discloses that he completed the necessary paperwork for the accused to be charged at some time after the accused had been returned to his cell at 9.15 that morning, and that he finished duty at about 11 o'clock that morning. Accordingly, the entry was made somewhere between eight and 10 hours after the apprehension of the accused.

[25] The entry was made after the discovery of the methamphetamine on the accused's person and after Peberdy had spoken to Tomic about his observations on the night. The information contained in the entry was an amalgam of the observations of both officers, but made by Peberdy on the basis of his own observations and his understanding and assumptions concerning Tomic's observations. Peberdy's description of the accused as a "POI" was based on Tomic's subsequent advice that the accused had come to his attention in the building, and was no doubt influenced by the fact that the accused had subsequently been found in possession of a large quantity of methamphetamine.

[26] Peberdy's reference in the PROMIS entry to the accused being observed to depart the terminal was based on his understanding that Tomic had seen the accused leave the terminal building. That was correct in the sense that Tomic had seen the accused "depart" the terminal building, but the entry was not intended to suggest that Tomic had followed the accused from the terminal and had seen him get into the vehicle. As Peberdy said in evidence, he could not say what Tomic saw. Tomic's evidence was that although he saw the accused walk out of the terminal building, he did not follow him from building. Peberdy himself had seen the vehicle depart in the circumstances described above, which formed the basis for the reference in the PROMIS entry to the accused being observed to depart the terminal in the vehicle.

[27] Having regard to the circumstances in which the 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".[5]

[28] Counsel for the accused also adverted to the number of further matters which were said to support a finding of ulterior purpose.

[29] During the course of cross-examination defence counsel suggested that Peberdy had tailored his evidence on the basis that he was aware the *voir dire* hearing related to the lawfulness of the traffic apprehension. Peberdy agreed that he had discussed the nature of the defence objections to the receipt of the evidence with both the prosecutor and Tomic, and had discussed why he considered his actions were lawful. He denied that he had tailored his evidence with reference to those considerations.

[30] In considering that suggestion it is necessary to bear in mind that the defence first particularised its objection to the receipt of the evidence by way of a document which was filed and served on 15 December 2019, and that Peberdy's *viva voce* evidence was consistent with the statutory declaration made on 10 April 2019. Conversely, the content of that statutory declaration was inconsistent with the propositions put by counsel for the accused concerning the chain of events and the purpose of police in stopping the vehicle. I am unable to accept that at the time he made the statutory declaration Peberdy framed the

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5 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 at [90]-[91].

document in contemplation of a defence objection which was not particularised until some eight months later. The same may be said of the statutory declaration made by Tomic.

[31] Defence counsel also sought to make much in cross-examination of what was said to be the implausible coincidence that the passenger in the vehicle apprehended was the same person Tomic had observed in the terminal building a short time earlier. That does not necessarily follow. Tomic was in the terminal building that night for the specific purpose of observing passengers disembarking from late night flights. He no doubt observed many passengers that night and no doubt took note of various things about them. Most, if not all, of those passengers would have left the terminal building in a vehicle of some type. It is hardly implausible in those circumstances that a passenger in a vehicle pulled over in the airport precinct had disembarked from an earlier flight, or that the apprehending police officer might have observed the passenger at the time of disembarkation.

[32] Finally, counsel for the accused adverted to what were described as key discrepancies between the evidence of the police witnesses which were said to undermine that evidence and support the defence's assertions of ulterior purpose. They included such matters as whether the police vehicle was parked to the left or right of the terminal exit, whether the vehicle in which the accused was travelling left from the passenger pickup area or the short-term car park, and the officers' different

recollections concerning the extent and content of any conversation between them prior to the apprehension of the vehicle.

[33] They are inconsistencies between the recollections of witnesses which might be expected in circumstances where the evidence was given more than eight months after the events in question. I consider those discrepancies to be of little forensic moment. By way of example, the defence submission is that Tomic deliberately lied in evidence about the location of the police vehicle and the area from which the accused's vehicle departed in order to make it appear less likely that he had followed the accused from the terminal building. It was unnecessary for Tomic to fabricate evidence for that attenuated purpose, and I consider it highly unlikely that he did so. Leaving aside that assessment, the submission is contingent on and built around a particular interpretation of the PROMIS entry. For the reasons I have given, I do not accept that interpretation or the consequences which are said to flow from it.

The search of the vehicle and the accused

[34] Section 120C of the *Police Administration Act* provides:

> **Searching without warrant**
>
> A member of the Police Force may, without warrant, stop, detain and search the following:
>
> (a) an aircraft, ship, train or vehicle if the member has reasonable grounds to suspect that a dangerous drug, precursor or drug manufacturing equipment may be found on or in it;

(b) any person found on or in an aircraft, ship, train or vehicle being searched under paragraph (a);

(c) a person in a public place if the member has reasonable grounds to suspect that the person has in his or her possession, or is in any way conveying, a dangerous drug, precursor or drug manufacturing equipment.

[35] The exercise of the power required the apprehending police officers to have "reasonable grounds to suspect that a dangerous drug … may be found" in the vehicle. Those reasonable grounds must have existed in both the subjective and objective senses which are discussed further below. If there were not reasonable grounds in both senses, the search was "improper" within the meaning of s 138 of the *ENULA*. It is less clear whether this would constitute a contravention of the law in the relevant sense, as mere failure to satisfy the conditions necessary for the exercise of a statutory power may in some circumstances not constitute a contravention of the law.[6] That uncertainty notwithstanding, where the power in question is one which abrogates a fundamental liberty and is exercised by law enforcement authorities, the better view is that a failure to comply with the statutory limitations on the exercise of the power will constitute a contravention of the law in the relevant sense.

[36] Before going on to discuss what constitutes reasonable grounds in these circumstances, it is necessary to give some attention to the anterior request by police that the driver of the vehicle produce his

6 *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 at [30] per French CJ.

licence and state his name. Section 113 of the *Motor Vehicles Act 1949* (NT) provides that the driver of a motor vehicle must produce his licence to a police officer for inspection on request, and must state his name and address to a police officer on request. That obligation is not conditioned on the formation of any reasonable belief or suspicion on the part of the requesting police officer. Even if it was, police had ascertained that the vehicle was unregistered by the time the request was made. In those circumstances, it was both proper and lawful for police to make the request notwithstanding that the vehicle had initially been apprehended for the conduct of a random breath test.

[37] Turning then to the exercise of the power under s 120C of the *Police Administration Act*, the section requires reasonable grounds for a suspicion. Reasonable grounds for belief are not required. Suspicion and belief are different states of mind.[7] As Lord Devlin said in *Hussien v Chong Fook Kam*:[8]

> 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.

[38] Suspicion denotes a less positive state of mind than belief. Although the facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, some factual basis for the

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7 See *George v Rockett* (1990) 170 CLR 104 at 115.

8 *Hussien v Chong Fook Kam* [1970] AC 942 at 948. The formulation was adopted and applied by the High Court in *George v Rockett* (1990) 170 CLR 104 at 115.

suspicion must be shown.[9] As Kitto J observed in *Queensland Bacon Pty Ltd v Rees*:[10]

> 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 to a 'slight opinion, but without sufficient evidence', as Chambers's Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which 'reason to suspect' expresses in sub-s. (4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes – a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors.

[39] While the formation of both a belief and a suspicion may involve an element of surmise or conjecture on the part of the police officer concerned, there must exist some facts "which are sufficient to induce that state of mind in a reasonable person".[11] However, the determination of whether there were reasonable grounds for suspicion does not involve the application of ordinary rules of proof and evidence. As the Supreme Court of Victoria observed in *Walsh v Loughnan*:[12]

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9 *Zoric v Police* [2006] SASC 355.

10 *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 303. That formulation was also cited by the High Court in *George v Rockett* (1990) 170 CLR 104 at 115-116.

11 See *George v Rockett* (1990) 170 CLR 104 at 112. See also *Police v Beck* (2001) 79 SASR 98 at [36]-[38].

12 *Walsh v Loughnan* [1991] 2 VR 351 at 357. See also *R v Rondo* (2001) 126 A Crim R 562 at [53].

> The questions to be determined by the learned magistrate were not to be resolved by reference to the rules of evidence or by the application of a test related to the balance of probabilities. In the process of investigation it is by no means uncommon for information to be obtained which would not be admissible in a court of law, or for well-founded suspicions and beliefs to be developed on the basis of a variety of pieces and types of information, including evidence of consistency or inconsistency of conduct, which could not be advanced as proof of the facts outlined or suspected to exist.

[40] The judicial assessment of what is required to found a reasonable suspicion involves a balancing exercise having regard to the limitations which the statute places on incursions into civil liberties and the public interest in effective law enforcement activity. As the Full Court of South Australia stated in *R v Nguyen*:[13]

> A suspicion that a fact exists is less certain than a belief in the existence of that fact. A belief is held on information which is accepted as reliable and implies a reasonable satisfaction that the fact is at least more likely to be true than any other alternative fact or facts. On the other hand, a suspicion that a fact exists, in the context of an investigation of the truth of that fact, is a working hypothesis for which there is some supporting material. There must be a rational connection between the supporting material and the suspicion. Mere curiosity, speculation or "idle wondering" about the existence of the fact is not the same as a suspicion that it exists.
>
> Importantly, s 52(6) and (9) of the CSA require more than an actual suspicion; the police officer must not only suspect but "reasonably suspect" that the person possesses an illicit substance or that there is evidence of an offence against the CSA in a vehicle. The additional element of reasonableness means that the information or material from which the suspicion arises must not only rationally produce a suspicion in the mind of the police officer, but it must also engender that suspicion in the mind of a person thinking reasonably about that information. The evaluation

13 *R v Nguyen* (2013) 117 SASR 432 at [21]. See also *Murray, Hale and Olsen (Pseudonyms) v The Queen* [2017] VSCA 236 at [62].

> of the reasonableness of the suspicion must be undertaken in the context of the purpose of the powers, and the civil liberties abrogated by their exercise. It is not reasonable to be overly incredulous at one extreme or naively gullible on the other. It is not reasonable to suspect the existence of facts on flimsy material or by a process of reasoning which relies on tenuous, albeit rational, connections. On the other hand, it would be unreasonable, and would deny the power much of its utility, to demand material which supports a positive belief in the existence of the relevant facts.

[41] That balancing exercise was also adverted to by the Supreme Court of Canada in *R v MacKenzie*[14], in which the majority stated:

> Reasonable suspicion must be grounded in objectively discernible facts, which can then be subjected to independent judicial scrutiny. While it is critical that the line between a hunch and reasonable suspicion be maintained to prevent the police from engaging in indiscriminate or discriminatory practices, it is equally vital that the police be allowed to carry out their duties without undue scepticism or the requirement that their every move be placed under a scanning electron-microscope.

[42] The question for consideration in that case was whether police had a reasonable suspicion that the accused was involved in a drug-related offence at the time they searched his vehicle. The police relied on the accused's erratic manner of driving, high level of nervousness, the pinkish hue of his eyes, his course of travel and contradictory answers on his travel dates in determining that the reasonable suspicion standard was met. The Court held by a 5-4 majority that there were reasonable grounds for the relevant suspicion. The circumstances of

14 *R v MacKenzie* [2013] 3 SCR 250.

that case and the result demonstrate the difficulties which present in marginal cases, and the scope for reasonable minds to differ.

[43] There is, of course, limited utility in examining the particular circumstances which have been subject to consideration in other cases. The assessment in each case will turn on its own circumstances. However, an examination of the factual basis proffered for the reasonable suspicion in other cases, and the judicial assessment of that basis, is at least illustrative.

[44] The power of search under consideration by the Full Court of South Australia in *R v Nguyen*[15] required that the police officer have a reasonable suspicion that the appellant was in possession of illicit drugs. The subject matter of the requisite suspicion was the person rather than the vehicle in which she was travelling. The grounds put forward for the suspicion were that: (1) police believed the house from which the vehicle had emerged was the location of drug taking, and perhaps drug dealing, over an extended period, although there was no suspicion there were drugs in the house at the material time; and (2) the vehicle the appellant was driving had six months earlier been found to contain heroin after it had been driven by two unrelated persons. Against that background, the police officer did not know the identity of the appellant or anything about her. In those circumstances, there were

15 *R v Nguyen* (2013) 117 SASR 432 at [29]-[30].

understandably found to be no reasonable grounds for a reasonable suspicion that the appellant was in possession of illicit drugs.

[45] In the *State of Western Australia v Texeira*[16] the requisite suspicion was that an offence may have been, or was being, committed. That suspicion was found to be established by the aggressive demeanour of the occupants of the vehicle when it was stopped, which the police officers believed was for the purpose of distracting their attention from the vehicle, and a smell of cannabis coming from within the vehicle.

[46] In *O'Connor v R*[17], the question under consideration was whether police officers had a reasonable suspicion that the appellant was in possession of stolen goods prior to searching him and finding cannabis in his possession. That suspicion was said to be based on the fact that the appellant had a criminal record for property and street offences, and that he was out on the street at midnight. The appellant was not at the time carrying a bag or anything else. The Court found that the suspicion was not reasonably grounded in those circumstances.

[47] In *The Queen v Grosvenor*[18], this Court found that a reasonable suspicion that the subject vehicle may contain dangerous drugs was established on the basis of: (1) information obtained to that stage in the investigation, including information that the vehicle would be used to

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16 *State of Western Australia v Texeira* [2017] WADC 31.

17 *O'Connor v R* (Unreported, District Court of New South Wales, 12 August 2010).

18 *The Queen v Grosvenor* [2014] NTSC 49.

transport illicit drugs on the day in question; and (2) information received that the accused was going to attend, and then did in fact attend, the house of an associate on whom police had significant "intelligence holdings".

[48] In *Forrester v Mattson*[19], this Court found a reasonable suspicion that the appellant was in possession of a dangerous drug was established on the basis that: (1) the appellant was walking at 2.00 am in a suburban park where there was a high incidence of drug use and drug-related offending; (2) the appellant appeared to be hiding as he walked from tree to tree, constantly looking behind him; (3) the appellant was apparently intoxicated with a substance, evidenced by slurred speech and some unsteadiness; and (4) the appellant attempted to conceal his wallet or at least to keep police attention away from his wallet.

[49] In *Nicholas v Cann*[20], this Court considered the question whether there were reasonable grounds to suspect the commission of an offence under the *Liquor Act* so as to permit search and seizure without warrant. Reasonable grounds for suspicion were found to exist on the basis that: (1) police had received very specific information from an anonymous caller about the location in which alcohol was stored illicitly; (2) similar information had been provided 12 months earlier; (3) there were a series of reports over the previous 12 months which reasonably

19 *Forrester v Mattson* [2016] NTSC 16.

20 *Nicholas v Cann* [2018] NTSC 83.

suggested a tendency on the part of the suspect to have alcohol in his possession or control in an alcohol protected area; and (4) the police officer had knowledge based on experience of the drinking/storage patterns of Caucasian people in remote communities.

[50] Conversely, in *Rigby v Mulhall*[21] this Court found that there were insufficient grounds on which to reasonably suspect that a dangerous drug may be found in the vehicle in question. The grounds proffered in that case were that: (1) the vehicle was being driven by the respondent who was the subject of information contained on the police intelligence database to the effect that he was involved in transporting drugs between Palmerston and Katherine and the rural areas at night; (2) the time of the events was shortly after 3 am and, to the knowledge of police, the respondent had a daytime job; and (3) the vehicle was observed to be leaving a service station. The Court found that the quality of the information in the police database was subject to serious concerns and of insufficient weight to support a reasonable suspicion of drug-related activity on the part of the respondent. The other matters referred to did not provide reasonable grounds to suspect that a dangerous drug may be found in the vehicle. That was particularly so given the presence of the respondent's wife and baby in the vehicle, dressed in pyjamas. Their presence, which was known to police before undertaking the search, was clearly inconsistent with a suspicion that

21 *Rigby v Mulhall* [2019] NTSC 70.

the respondent was undertaking a drug run and more obviously consistent with a late night trip to the service station for some domestic need.

[51] Turning then to the circumstances of this matter, Peberdy was the officer who formed the suspicion and initiated the search. The first step in the enquiry concerning reasonable grounds is to determine the matters taken into account by him in forming that suspicion. The circumstances in which the vehicle was initially apprehended have already been described. Peberdy's evidence in relation to the matters on which he relied in forming the suspicion may be summarised as follows:

(a) the driver of the vehicle had a dishevelled appearance and a strong body odour;

(b) the interior of the vehicle was in a messy state, which in Peberdy's experience suggested that the driver had been "living rough" in the manner of a drug user or alcoholic;

(c) the driver of the vehicle had a recent conviction with a custodial sentence for the possession of a trafficable quantity of a Schedule 1 drug;

(d) Peberdy was aware from his discussion with Tomic at the back of the vehicle that the passenger had recently arrived on the Tiger Airways flight from Brisbane;

(e) from his experience working in the Australian Federal Police for 16 years, and his many years' experience in policing at the Darwin International Airport, Peberdy was aware that drugs are commonly trafficked on "redeye flights" run by the cheaper airlines; and

(f) during Peberdy's conversation with the driver of the vehicle he noted that the accused did not look at him and stared fixedly ahead, which he found to be suspicious behaviour.[22]

[52] On the basis of those matters Peberdy advised the driver and the accused that he would be conducting a search of the vehicle and its occupants. He then searched the driver and asked him to stand at the rear of the vehicle. He then approached the accused. He noticed that the accused was wearing a long-sleeved flannel shirt with a T-shirt under it, and was sweating. Peberdy found this to be odd given the tropical weather.

[53] Defence counsel submitted that this matter could not be taken into account in the assessment of whether there were grounds for a reasonable suspicion as it came to Peberdy's attention after he had

22 The Outline of the Crown Case also suggests that the accused appeared to be under the influence of intoxicating substance of the time. There was no evidence received during the course of the *voir dire* hearing to that effect.

determined to search the vehicle and its occupants. I do not accept that to be necessarily correct. Section 120C of the *Police Administration Act* confers a power to search a vehicle and its occupants if the member has reasonable grounds to suspect that a dangerous drug may be found in the vehicle, and a power to search a person in a public place if the member has reasonable grounds to suspect that person has a dangerous drug in his or her possession. Those powers are conferred in separate limbs, and immediately prior to the search of the accused was a person in a public place.[23]

[54] Peberdy was entitled to take into account all the information in his possession in forming a reasonable suspicion up to the point he conducted the search of the accused. Information coming into his possession after he had determined to search the vehicle but before he conducted the search of the accused is not excluded under the terms of the provision, and might properly be considered in determining whether there were reasonable grounds to suspect that the accused had a dangerous drug in his possession. Having reached that conclusion, however, it would appear from Peberdy's *viva voce* evidence that he did not rely on the inappropriateness of the accused's clothing in forming his subjective suspicion that either the vehicle or its occupants were carrying a dangerous drug.

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23 See definition of "public place": *Interpretation Act 1978* (NT), s 17.

[55] I have no doubt that Peberdy subjectively held a suspicion on the grounds identified in his evidence. The question then becomes whether there was adequate supporting material for that suspicion and a rational connection between that material and the suspicion, or whether Peberdy's state of mind was mere speculation or "idle wondering" based on tenuous connections. The objective information, material or circumstances must be sufficient to induce in the mind of a reasonable person a positive inclination towards acceptance of the subject matter of the suspicion; and the sufficiency of the information, material or circumstances to induce that suspicion in a reasonable person must be capable of appearing to the satisfaction of the court.[24]

[56] The development of a reasonable suspicion may come from a range of sources, and, as already described, need not be based on evidence which would be admissible in a trial. Those sources include similar facts, as in where a set of circumstances are similar in nature to those surrounding previous offences of a particular type. The fact that in the police officer's experience the cross-border transportation of drugs often took place on late-night flights with low-cost airlines was a matter which was capable of informing the suspicion, although not in

24 See *Prior v Mole* (2017) 261 CLR 265 at [4], [24], [98]-[100]. Although that case involved whether there were reasonable grounds for a belief rather than a suspicion, the process of assessing reasonableness is the same.

and of itself sufficient to found a reasonable suspicion in these circumstances.

[57] A person's prior criminal history may also be taken into account. Again, however, the driver's recent conviction for the possession of a trafficable quantity of a Schedule 1 drug would not be enough in itself to establish a reasonable suspicion that there were drugs in the vehicle. The mere fact that a person has a relevant criminal record could not alone form a reasonable basis for the detention and search of the person or vehicle in which he or she is travelling.

[58] Time, place and circumstance may also be used in the development of reasonable suspicion, and may be used in conjunction with other facts and information. In this particular case, it was legitimate to attach a higher degree of suspicion to the presentation and circumstances of the accused and his associate given the time of night and the fact that the accused had recently disembarked from a night-time flight, and had the means and opportunity for involvement in a cross-border transportation.

[59] As is apparent from some of the cases considered above, the behaviour of a person may also form the basis for a reasonable suspicion. That is particularly so in the case of Australian Federal Police officers who are experienced in the observation of behaviours which are associated with particular types of offending, including such matters as nervousness

and unusual eye contact. Evidence to that effect was given during the course of the *voir dire* hearing by the AFP Team Leader on the night. Whether behaviour alone will provide a sufficient basis, and the extent to which further support must be derived from other information or circumstances, will depend upon the nature of the behaviour. In this case, Peberdy's observations of the accused were limited to the fact that he was staring fixedly ahead during Peberdy's conversation with the driver. That behaviour would not be enough in itself to found a reasonable suspicion, but might form the basis of a reasonable suspicion in conjunction with other information or circumstances.

[60] The final source of the suspicion in this case is perhaps the most contentious. That was Peberdy's observations in relation to the appearance of the driver and the condition of the car, and the conclusions he drew from that. The defence submits that to form a suspicion of drug-related offending on that basis is no more than profiling. It is not suggested that the police officer drew any conclusion based on the accused's Aboriginalty. Rather, the suggestion is that the police officer drew certain conclusions based on dress, hygiene and orderliness which bore no rational connection to the possibility of drug-related offending. The submission followed that drawing a connection on that basis is to characterise socio-economic status as a basis for suspecting the possession of a dangerous drug.

[61] That submission must be considered in light of the other factors identified by the police officer which have been described above, and having regard to the police officer's experience. The danger of prejudice of that kind and the significance of police experience was discussed by Nettle J in *Prior v Mole* in following terms (citations omitted):[25]

> Granted, experience may sometimes breed prejudice, which is regrettable. Prejudice is irrational and does not afford reasonable grounds for decision-making, and in the case of a police officer it is unacceptable. But knowledge born of experience is not irrational − it is empirical − and, depending on the experience of a police officer, may properly comprise a significant part of the officer's crime detection and prevention armoury. For example, a police officer might use knowledge based on previous experience to identify particular circumstances and behaviour that support a belief on reasonable grounds that observed individuals have engaged in a drug transaction. A further example was posed by counsel for the appellant in oral argument: it might be open to a police officer to believe on reasonable grounds that a visibly intoxicated person walking towards a car holding what appear to be keys to a car might be about to commit an offence of driving under the influence of alcohol. Accordingly, where a police officer encounters circumstances of a kind which, by reason of his or her previous experience, he or she rationally associates with an identified class of committed or anticipated offending, the occurrence of those circumstances may reasonably lead the officer to conclude that there is a significant probability of that identified class of offending taking place. As was observed by the United States Supreme Court in *Terry v Ohio*, although little weight can be given to an officer's "inchoate and unparticularized suspicion or 'hunch'", due weight must be given to the specific reasonable inferences which a police officer is entitled to draw from the facts in light of his or her experience.

25 *Prior v Mole* (2017) 261 CLR 265 at [71].

[62] The legitimacy of police experience in the formation of a reasonable suspicion was also discussed by the Supreme Court of Canada in *R v MacKenzie*[26] in the following terms:

> Officer training and experience can play an important role in assessing whether the reasonable suspicion standard has been met. Police officers are trained to detect criminal activity. Thus, in assessing whether a case for reasonable suspicion has been made out, the analysis of objective reasonableness should be conducted through the lens of a reasonable person standing in the shoes of the police officer. Expert qualifications are not required as a precondition for police testimony on matters properly within the realm of officer training and experience. However, police training and experience should not be accepted uncritically by the courts. Hunches or intuition grounded in an officer's experience will not suffice, nor is deference necessarily owed to a police officer's view of the circumstances because of his or her training or experience in the field. Essentially, a trial judge must appreciate the significance of police training and experience when evaluating the worth of the factors considered in forming a belief that an accused might be involved in a drug-related offence.
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> Here, the trial judge did not reject the officers' evidence as to the nature of their detail on the day in question and he declined to make an adverse finding of credibility. Therefore, it is accepted that the officer's testimony was credible. The factors identified by the officer provide the objective basis needed to support his belief that the accused might be involved in a drug-related offence. Looking at the totality of the evidence through the lens of an officer with training and field experience in the transportation and detection of drugs, the officer's subjective belief that the accused might be involved in a drug-related offence was objectively substantiated.

[63] As described above, the factors identified by police in that case as founding the suspicion that the accused might be involved in a drug-

26 *R v MacKenzie* [2013] 3 SCR 250.

related offence included nervousness, appearance, and where and when he was travelling.

[64] There will be circumstances in which a person's appearance may found a reasonable suspicion that the person is a drug user, or involved in some drug-related transaction, and in which that judgement may be described as one made having regard to what might be characterised in part as socio-economic factors. Peberdy's evidence in this respect was, in effect, that he suspected on the basis of the driver's appearance and that of his car that he was a drug user. While I consider that assessment was within the province of a police officer with 16 years' experience, it was not sufficient in itself to give rise to a suspicion that there were dangerous drugs in the vehicle. The question is whether that assessment, when considered in combination with the other matters identified by the police officer, were enough to induce that suspicion in a reasonable person having due regard to the officer's experience.

[65] During the course of submissions, the Crown suggested that the reasonableness of the suspicion could be tested by the fact that when searched the accused was found to be in the possession of a commercial quantity of methamphetamine. I do not accept that submission. The relevant enquiry is whether the information in possession of the officer immediately prior to the search was sufficient to found a reasonable suspicion. The nature and quality of that

information cannot be improved by the fact that the subsequent search does disclose the presence of a dangerous drug.

[66] Although the matter is relatively finely balanced, I have come to the conclusion that the police officer did have reasonable grounds to suspect the presence of dangerous drugs in the vehicle. The combination of the driver's recent drug conviction, the conclusions drawn from the appearance of the driver and the condition of the vehicle, the accused's behaviour while the police officer was speaking to the driver, and the fact that the accused had recently disembarked from a late-night flight reasonably led the officer to suspect that there were dangerous drugs in the vehicle. Although those matters fell well short of establishing a likelihood or probability that there were dangerous drugs in the vehicle, the state of mind formed by the officer was more than an unparticularised suspicion or hunch.

[67] That conclusion makes it unnecessary to consider whether the desirability of admitting the evidence outweighs the undesirability of admitting the evidence. Had I concluded that there were not reasonable grounds for suspicion I would have ruled the evidence obtained as a consequence of the search inadmissible. That is so notwithstanding the extremely high probative value of the evidence and its critical importance to the prosecution case, the seriousness of the offence, and the fact that there would have been no deliberate

impropriety on the part of the police officers. That result would be dictated by the importance which must be attached to ensuring that law enforcement officers entrusted with powers which abrogate fundamental liberties pay close attention to the conditions and limitations on the exercise of those powers.

Ruling

[68] The evidence obtained as a consequence of the stop and search of the Mazda motor vehicle bearing Northern Territory registration CD 32 TI and its occupants on 1 April 2019 is not excluded by operation of s 138 of the *Evidence (National Uniform Legislation) Act 2011*.
