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**IN THE YOUTH COURT  
AT MANUKAU**

**I TE KŌTI TAIOHI  
KI MANUKAU**

**CRI-2020-292-000148**

**CRI-2020-092-005190**

**[2020] NZYC 600**

**NEW ZEALAND POLICE**

Prosecutor

v

**[FB]**

**Young Person**

**[BA]**

Defendant

Hearing: 28 August 2020 and 11 November 2020

Appearances: L Evans for Prosecution  
J Kincaid QC and A Shendi for [BA]  
M Mason for [FB]

Judgment: 25 November 2020

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**RESERVED DECISION OF JUDGE S PATEL**

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[1] On the morning [in late] May 2020 [two Constables] were on patrol in [suburb deleted]. Their duties related to vehicle crime and burglaries in the area. That involved trying to “communicate on a more down to earth level with members of the public.”<sup>1</sup> and “stopping vehicles to identify who was in the area”.<sup>2</sup>

[2] The constables stopped a car driven by the young person, [FB]. It was one of the first vehicles the constables had seen since commencing their shift. The defendant [BA] was a front seat passenger. The stop was made pursuant to s 114 of the Land Transport Act 1998 (LTA). [The first Constable] obtained the licence details of [FB], [BA] and the other passenger. These details were obtained in a carpark adjacent to where the car was parked. From that point [FB] and [BA] were not free to leave.<sup>3</sup>

[3] After [FB]’s licence details were checked [the second Constable] immediately informed him that an inspection of the vehicle would occur. During the inspection [the second Constable] found the barrel of a firearm under a white bag and boxing gloves which were behind the driver’s seat.

[4] Finding the firearm barrel led to a search for firearms pursuant to the Search and Surveillance Act 2012 (SSA). Containers with cannabis residue were found in a white bag behind the driver’s seat. A search for drugs pursuant to the SSA occurred. This led to a rifle stock, packets of cannabis, a cannabis grinder and a cone for smoking cannabis being found in the car.

[5] A search of [BA] led to a magazine containing 10 rounds of .22 ammunition and about \$2000 being found in a bag he was wearing.

[6] [FB] faces charges of:

- (a) Possession of cannabis for supply;<sup>4</sup>

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<sup>1</sup> Notes of evidence page 23, line 13.

<sup>2</sup> NOE page 23, line 15.

<sup>3</sup> NOE page 66, line 22.

<sup>4</sup> Misuse of Drugs Act 1975, s 6(1)(f).

- (b) Possession of a utensil for consuming cannabis;<sup>5</sup>
- (c) Possession of a restricted rifle without some lawful, proper and sufficient purpose.<sup>6</sup>

[7] [BA] faces one charge of being in possession of ammunition without some lawful, proper and sufficient purpose.<sup>7</sup>

[8] Both defendants have challenged the admissibility of the items that form the subject of the charges. Broadly, it is submitted that search of the vehicle was unlawful. The argument can be broken down into the following parts:

- (a) The stopping of the vehicle was unlawful as it was not for a road transport purpose;
- (b) There was no lawful power to inspect the vehicle and the inspection amounted to an unlawful search;
- (c) There was no power to invoke the searches under the SSA;
- (d) The evidence ought to be ruled inadmissible pursuant to s 30 of the Evidence Act 2006.

### **Was the stopping of the car unlawful?**

[9] [The second Constable] was driving the patrol car. It was he who decided to stop [FB]'s car. In evidence he said [FB]'s car was the first he had seen that day. There was nothing relating to the car itself or the way it was being driven that led to the stop. Rather, the stop was consistent with his duties "to try and talk to as many people as we could from the area."<sup>8</sup> Later in his evidence he said that the vehicle was stopped because of the age of the driver and the occupants.<sup>9</sup>

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<sup>5</sup> Misuse of drugs Act 1975, s 13(1)(a) and 13(3).

<sup>6</sup> Arms Act 1983, s 45(1).

<sup>7</sup> Arms Act 1983, s 45(1).

<sup>8</sup> NOE page 5, lines 25-29.

<sup>9</sup> NOE page 25, lines 8-14 and page 31, lines 1-3.

[10] After the car was stopped [the first Constable] requested the licence details of all the occupants of the car. There was no evidence that [FB] failed to provide any particulars asked of him or that he was in breach of his licence.

[11] The stop was made in reliance of s 114 of the LTA. It provides:

114 Power to require driver to stop and give name and address, etc

(1) An enforcement officer who is in uniform, or wearing a distinctive cap, hat, or helmet, with a badge of authority affixed to it, may signal or request the driver of a vehicle to stop the vehicle as soon as is practicable.

(2) An enforcement officer in a vehicle following another vehicle may, by displaying flashing blue, or blue and red, lights or sounding a siren, require the driver of the other vehicle to stop.

(2A) Subject to subsections (4) and (5), the driver of a vehicle that is stopped by an enforcement officer under this Act must remain stopped for as long as is reasonably necessary for the enforcement officer to complete the exercise of any powers conferred, or duties imposed, on an enforcement officer by this Act.

(3) An enforcement officer may require the driver of a vehicle that is stopped under this Act to—

(a) remain stopped for as long as is reasonably necessary for an enforcement officer to obtain the particulars referred to in paragraph (b), or to complete the exercise of any other power conferred on an enforcement officer by this Act; and

(b) on demand by an enforcement officer,—

(i) give his or her full name, full address, date of birth, occupation, and telephone number, or such of those particulars as the enforcement officer may specify; and

(ii) state whether or not he or she is the owner of the vehicle; and

(iii) if the driver is not the owner of the vehicle, give the name and address of the owner or such particulars within the driver's knowledge as may lead to the identification of the owner.

(4) The driver of a vehicle that is stopped under subsection (2) is not obliged to remain stopped if the vehicle with flashing lights and siren does not itself stop in the near vicinity of the place where the driver has stopped.

(5) An enforcement officer may require a driver to remain stopped on a road for as long as is reasonably necessary to enable the officer to establish the identity of the driver, but not for longer than 15 minutes if the requirement to remain stopped is made under this subsection only.

(6) An enforcement officer may arrest a person without warrant if the officer has good cause to suspect the person of having—

(a) failed to comply with this section or a signal or request or requirement under this section; or

(b) given false or misleading information under this section.

[12] The power to stop a vehicle under s 114 of the LTA can only be exercised for purposes associated with enforcement of the LTA.<sup>10</sup> However its use is not dependant on any breach of the relevant law or based on belief or suspicion of a breach.<sup>11</sup>

The power to stop a vehicle, however, is not unrestricted. In *Tapara v Police*, Gallen J, in discussing section 66 of the Transport Act 1962, the predecessor to s 114, said:<sup>12</sup>

...but that is not to say that s66 confers completely unrestricted rights to interfere with the activities of a citizen apart from those obligations. There are analogies with the powers of arrest and the Courts have always been astute to ensure that such an interference with the rights of an individual must be conducted within strict limits and within defined parameters...Against that background, I think it is inconceivable that Parliament could have intended to provide a completely unrestricted right under the provisions of s66 Transport Act, a right if Mr Douch is correct, would allow even capricious stopping.

[13] Whether the stop was unlawful in this case depends on whether it was associated with enforcement of the LTA. For the prosecution it is submitted the stop was for such purposes. That is, to ensure that [FB] was adhering to his licence conditions. It is further submitted that it might have led to further enquiries being made pursuant to the LTA, for example, whether [FB] had his licence in his possession, the wearing of corrective lenses or compliance with an alcohol interlock licence.

[14] I consider that the primary purpose of the stop is informed by the duties of the Constables that day, namely to speak to persons in relation to car crimes and burglaries. That view is reinforced given the following:

(a) [The second Constable]’s evidence that he most likely would have stopped any vehicle driving past.<sup>13</sup>

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<sup>10</sup> *Attorney-General v Jones* [2003] UKPC 4816 PRNZ 715; *Po v MOT* (1987) 2 NZLR 756; *NZ Police v Duff* HC Rotorua CRI 2007-069-1885, 4 September 2009, Heath J.

<sup>11</sup> *Attorney-General v Jones*, above at n10, at [4].

<sup>12</sup> *Tapara v Police* [1990] 3 NZLR 204; (1998)3 CRNZ 616.

<sup>13</sup> NOE, page 23, lines 15-17.

- (b) [FB]’s age as a reason for the stop appeared to be somewhat of an afterthought given [the second Constable]’s evidence earlier that it was “an average vehicle with three people in it” and no reference was made to the age of the driver.
- (c) There is no evidence that [FB]’s details were checked against National Intelligence Agency as to his licence status and whether he was complying with the conditions of the same.
- (d) [The second Constable]’s first action after stopping [FB] was to inspect the vehicle. This tends to indicate that the stop was for purposes other than for the power provided by s 114.

[15] Accordingly, I find that the reason for stopping the car was primarily not related to enforcement of the LTA and was unlawful. Accordingly, I find that [FB]’s detention after the car was stopped also to be unlawful and that he was arbitrarily detained in breach of s 22 of the New Zealand Bill of Rights Act 1990 (NZBORA).

[16] I do not consider that my conclusion unduly restricts the use of s 114. Whether the use of the section is related to enforcement of the LTA will be dependent on the facts of each case.

**Was [the first Constable] able to obtain the particulars of [BA]?**

[17] After the car was stopped [the first Constable] asked for the details of [FB] and the other passengers, including [BA]. The request was both when the occupants were in the car and after they had left the vehicle.

[18] It is accepted by the prosecution the power under s 114 of the LTA does not extend to requesting the particulars of anyone other than the driver.<sup>14</sup> [The first Constable] had no lawful power to make such a request and [BA] had no requirement to provide his details.

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<sup>14</sup> *Baylis v R* [2018] NZCA 271 at [30] and *Wright v Bhosale* [2016] NZCA 593 at [40].

[19] The prosecution submits that although a request was made by [the first Constable], [BA] was entitled to refuse it. In *Wright v Bhosale* Hinton J made the following observations:<sup>15</sup>

[47] I add that I would consider it unwise practice on the part of the police to “ask” a passenger in Mr Wright's circumstances for identification, as the public would tend to view a request from the police in such circumstances as stemming from an entitlement. I note, as a matter of general law, that “a law enforcement officer is entitled to *ask* questions relating to the citizen’s identity and otherwise, but the citizen is perfectly entitled to refuse to give the information”. That was in the context of the right to silence. Whether that applies in the present context can await a case where it is relevant. In my view, declaratory relief should be limited to that reasonably necessary for the case at hand and not stray into broader propositions.

[20] I echo the comments of her Honour that it is an “unwise” practice to request the details of passengers who might consider the police as having an entitlement to request the same and of being compelled to respond.

#### **Was [BA] unlawfully detained?**

[21] It is submitted the police breached [BA]’s rights to freedom of movement and his right not to be arbitrarily detained under s 18(1) and s 22 of the NZBORA.

[22] [The first Constable]’s evidence was that the occupants of the car were not free to leave while he was checking their particulars or while [the second Constable] was “searching” the car.<sup>16</sup> I interpret “searching” as being the purported inspection pursuant to s 113 of the LTA.

[23] *Baylis v R* has similarities to the present case.<sup>17</sup> It involved the stop of a vehicle travelling at speed by two Constables. The stop was made pursuant to s 114 of the LTA. After obtaining the driver’s details [the Constable] obtained the details of the other three occupants. A search of the vehicle located methamphetamine, drug paraphernalia and cash.

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<sup>15</sup> *Wright v Bhosale*, above at n14, at [47].

<sup>16</sup> NOE, page 66.

<sup>17</sup> *Baylis v R*, above at n14.

[24] It was held that the continued detention of the vehicle while [the Constable] sought to obtain the details of the occupants, when she was not entitled to do so, breached the appellant's rights under 18(2) and s 22 NZBORA.<sup>18</sup>

[25] I did not apprehend the prosecution to disagree with the defence contention. I consider that there was no power to detain [BA] for his details or while the inspection of the car occurred. Accordingly, I find that [BA]'s rights to freedom of movement and not to be arbitrarily detained under s 18(2) and s 22 NZBORA were breached.

[26] I am also satisfied that there is a causative link between the breaches of [BA]'s NZBORA rights and the ammunition found in his bag. The search was conducted when he was unlawfully detained after the gun barrel was found in the car.

I find that the magazine was improperly obtained pursuant to s 30 of the Evidence Act 2006 which provides:

(5) For the purposes of this section, evidence is **improperly obtained** if it is obtained—

(a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies; or

### **Was the Inspection of the car unlawful?**

[27] [The second Constable]'s first interaction with [FB] was to tell him that he would be undertaking an inspection of the car for any faults or failures or issues of safety pursuant to s 113 of the LTA.<sup>19</sup> [FB] refused to consent to the inspection more than once. He was then told by [the second Constable] that he could be arrested for being obstructive. [FB] then consented to the inspection.<sup>20</sup>

[28] During the inspection [the second Constable] checked the windows, seatbelts and seats. During the check of the fastening behind the driver's seat, [the second Constable] found the gun barrel.<sup>21</sup> That led to a search for firearms being undertaken. That ultimately led to the discovery of the other items in issue.

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<sup>18</sup> At [34]

<sup>19</sup> NOE page 35, line 26.

<sup>20</sup> NOE pages 6-7.

<sup>21</sup> NOE page 9.

[29] Section 113 of The LTA provides:

113 Enforcement officers may enforce transport legislation

(1) An enforcement officer in uniform or in possession of a warrant or other evidence of his or her authority as an enforcement officer may enforce the provisions of—

(a) the Local Government Act 1974, the Local Government Act 2002, the Road User Charges Act 2012, the Government Rooding Powers Act 1989, the Railways Act 2005, the Land Transport Management Act 2003, and this Act:

(b) regulations and rules and bylaws in force under any Acts mentioned in paragraph (a).

(2) Without limiting any other powers conferred on an enforcement officer, an enforcement officer, in enforcing any provisions referred to in subsection (1), may at any time—

(a) direct a person on a road (whether or not in charge of a vehicle) to give the person's full name, full address, date of birth, occupation, and telephone number, or such of those particulars as the enforcement officer may specify, and give any other particulars required as to the person's identity, and (unless the person is for the time being detained or under arrest under any enactment) give such information as is within the person's knowledge and as may lead to the identification of the driver or person in charge of a vehicle:

(b) inspect, test, and examine—

(i) the brakes or any other part of a vehicle on a road or any associated equipment; or

(ii) a land transport document, or a document resembling a land transport document, displayed or carried on the vehicle:

(c) if the enforcement officer believes on reasonable grounds that a vehicle on a road causes an obstruction in the road or to a vehicle entrance to any property or that the removal of the vehicle is desirable in the interests of road safety or for the convenience or in the interests of the public,—

(i) enter, or authorise another person to enter, the vehicle for the purpose of moving it or preparing it for movement; and

(ii) move, or authorise another person to move, the vehicle to a place where it does not constitute a traffic hazard:

(d) direct the driver or person in charge of a vehicle on a road to remove the vehicle from the road or a specified part of a road, if the officer believes on reasonable grounds that it causes an obstruction in the road or to a vehicle entrance to any property or its removal is desirable in the interests of road safety or for the convenience or in the interests of the public:

(e) forbid an unlicensed driver to drive a motor vehicle:

(f) forbid a person who is operating a transport service without a licence to operate that transport service.

(3) An enforcement officer in uniform or wearing a distinctive cap, hat, or helmet, with a badge of authority affixed to it, who is for the time being engaged in the regulation of traffic on a road, may—

(a) direct a person using a vehicle or riding or driving an animal on the road to stop the vehicle or animal, as the case may be, or to cause it to proceed in or keep to a particular line of traffic or direction:

(b) direct a pedestrian not to proceed across the road in contravention of a direction to stop given by the enforcement officer (whether given to pedestrians or to pedestrians and other traffic).

(4) In paragraphs (c) and (d) of subsection (2), road includes any land vested in or under the control of the Crown or any local authority.

[30] On behalf of [FB] it is submitted that [the second Constable] did not have the power to inspect the car. [The second Constable]’s evidence was that he was enforcing s 114 of the LTA when he was inspecting the car.<sup>22</sup> It is submitted by the defence the same does not empower an inspection of the vehicle. That is, in inspecting the car he was not enforcing any of the purposes as defined in s 113(1) of the LTA. Second, it is submitted [the second Constable] had no probable cause to enter the vehicle given his evidence was there was nothing to raise any suspicion about the safety of the car from the outside of the vehicle.<sup>23</sup>

### **What Part of the LTA was [the second Constable] enforcing?**

[31] I do not consider that [the second Constable] was able to inspect the vehicle by enforcement of s 114 of the LTA. As has been discussed, s 114 of the LTA relates to the power to stop a vehicle and require the driver to give certain details.

[32] The prosecution submits that [the second Constable] was enforcing regulations and bylaws under the LTA relating to general safety requirements for all vehicles.<sup>24</sup> Such bylaws relate to safety standards for seats, seat anchorages, seatbelts, glazing and

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<sup>22</sup> NOE at page 33, lines 15-19.

<sup>23</sup> NOE at page 28, lines 17-19.

<sup>24</sup> Land Transport Rule: Seatbelts and Seatbelt Anchorages 2002; Land Transport Rule: Seats and Seatbelt Anchorages 2002; and Land Transport Rule: Glazing, Windscreen Wipe and Wash, and mirrors 1999.

mirrors. It is submitted the same is evidenced by [the second Constable]'s inspection of the seat belts, windows and driver's seat.

[33] It is also submitted [the second Constable] had the power to inspect the vehicle to check the general roadworthiness of the car. Despite the warrant of fitness for the car being current, the same did not mean the car was roadworthy. Non-operation orders can be issued in respect of a vehicle if it is deemed unsafe or defective.<sup>25</sup>

[34] I consider [the second Constable] had the ability to carry out an inspection of the brakes and any other part of the car pursuant to the LTA. That is, he was able to enforce regulations and bylaws under the LTA pursuant to s 113(1)(a) and (2)(b)(i) of the LTA. His failure to articulate the correct provision in his evidence is not fatal. I consider that despite [the second Constable] not referring to the correct part of the LTA that he was enforcing pursuant to s 113(1) does not rule the inspection invalid. Rather, the validity of the inspection will, in this case, depend on whether [the second Constable] was in fact exercising powers conferred by s 113.

#### **Does a s 113 inspection require sufficient reason or justification?**

[35] In his submissions Mr Evans did not address the more general defence submission that [the second Constable] did not have probable cause to enter the car and conduct an inspection.

[36] In both *Hill v Attorney-General*<sup>26</sup> and *Barton v Police*<sup>27</sup> it was held that an enforcement officer could enter a vehicle, pursuant to s 113 of the LTA and its predecessor s 68B of the Transport Act 1962. In *Hill v Attorney-General* that involved the power to enter a vehicle to inspect a cab authority. In *Barton v Police* that involved the power to enter a truck to inspect an odometer reading to enforce the Road User Charges Act 1977.

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<sup>25</sup> Land Transport Act 1998, s 115.

<sup>26</sup> *Hill v Attorney-General* (HC Wellington, CP26/86,30 June 1989).

<sup>27</sup> *Barton v Police* [2013] NZHC 1481.

[37] It appears from those decisions there is a limitation on the power to inspect. In *Hill v Attorney-General*, Eichelbaum J said:<sup>28</sup>

In the present case therefore, the traffic officer was entitled to exercise the powers conferred under s68B(1)(b) to inspect test and examine any part or equipment of the taxi, or cab authority, at any rate **given sufficient reason or justification**.

.....The general state of the vehicle alone warranted inspection. The reasons given for “writing the vehicle off the road” were stated as broken front seat, right rear tail light out, defective exhaust system. (emphasis added)

[38] In *Barton v Police*, Williams J stated:

[29] The broad approach to construing this type of provision was outlined in *Transport Ministry v Payn*. I am required to interpret the power under s113 in a way that appropriately balances the purpose of the section against Mr Barton’s civil liberties. The first step is to consider what the constable was doing and whether that conduct was prima facie an unlawful interference with a person’s liberty or property. It plainly was. The next step is to consider first whether such conduct falls within the general scope of any duty imposed by statute, and second whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

[39] In *Barton v Police* it was held that the enforcement officer directing the appellant to leave his vehicle so that the odometer could be checked was an unlawful interference with the appellant’s liberty. However, it was held that given the circumstances, particularly given it might have been dangerous for the officer to put his head in the vehicle given the behaviour of the appellant, that the inspection was not unlawful and that the balance between individual liberty and statutory purpose fell in favour of statutory purpose.<sup>29</sup>

[40] To determine whether the inspection of the car was unlawful I adopt the approach taken in both *Hill v Attorney-General* and *Barton v Police*.

[41] I consider the inspection was unlawful for the following reasons:

- (a) There was no sufficient reason or justification for the inspection given there was nothing about the appearance of the car that caused concern about its safety. Although the inspection found alleged defects relating

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<sup>28</sup> *Hill v Attorney-General*, above at n26, at 19-20.

<sup>29</sup> *Barton v Police*, above at n27 at [31].

to the passenger door and the roof of the car,<sup>30</sup> the same were found after [the second Constable] had entered the car.

- (b) [The second Constable] immediately informed [FB] the car was to be inspected. I consider that is telling. I consider he had pre-determined that he would inspect the vehicle. This was an inspection informed by an investigation of car and burglary crime as opposed to a purpose prescribed by s 113(1).
- (c) Although the power to inspect a car related to its safety falls within the scope of the duty imposed by s 113 of the LTA, the inspection in question involved an unjustifiable use of that power. I consider the balance between liberty and statutory purpose falls in favour of liberty in this instance. That is because I consider the inspection was not for enforcement of the LTA or regulations, rules or bylaws made under the LTA.

[42] The inspection was prima facie an unlawful interference with both [FB]'s liberty and property. [FB] was detained during the inspection and his car entered by [the second Constable]. The inspection also interfered with [BA]'s liberty given he was told to get out of the vehicle and was subsequently detained.

[43] I consider that the unlawful inspection of the car amounted to an unlawful search and s 21 of the NZBORA was breached. That is, [FB]'s right to be secure against unreasonable search and seizure. I also consider [BA]'s s 21 NZBORA right was breached. But for the search of the car he would not have been searched.

[44] There is a causative link between the unlawful inspection and the finding of the prohibited items. But for the inspection the prohibited items would not have been found either in the car or on [BA].

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<sup>30</sup> The damage to the roof of the car was disputed. Given my findings I need not determine that issue.

[45] Pursuant to s 30(5) of the Evidence Act I find that the evidence relating to [FB] and [BA] was improperly obtained in that it was in breach of s 113 of the LTA and s 21 of the NZBORA.

**Were the searches pursuant to the Search and Surveillance Act 2012 unlawful?**

[46] Two warrantless searches pursuant to the Search and Surveillance Act 2012 were invoked. The first search was after the firearms barrel was found. That was a search for firearms. The search was of the car and [BA]. It is alleged that [FB] admitted ownership of the barrel however this is disputed by [FB].

[47] The second search was invoked after the police found cannabis residue in the white bag. That was a search for drugs. It is alleged that [FB] admitted to ownership of the cannabis. This is disputed by [FB]. His evidence was that he admitted only to ownership of the cannabis grinder. Given my later findings I do not need to determine the factual disputes.

[48] Both [the second Constable] and [the first Constable] in their evidence were unable to articulate the section of the SSA the searches were carried out under.<sup>31</sup> It is submitted that because of that the searches were unlawful.

[49] I do not consider that the searches were not lawful on the basis the constables did not know the provisions of the SSA they were purporting to be acting under. In his evidence [the first Constable] told [FB] and [BA] that the first search was for firearms<sup>32</sup> and that the second search was for drugs.<sup>33</sup> I consider that satisfies the requirements of s 131 of the SSA.

[50] Given my earlier conclusions that the stopping of the car, the detention of [FB] and [BA] and the inspection of the car were unlawful and that there is a causal link between the evidence in issue and those breaches, nothing turns on the lawfulness or otherwise of the searches.

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<sup>31</sup> NOE pages 41 and 67.

<sup>32</sup> NOE page 67.

<sup>33</sup> NOE page 53.

[51] I have found that the impugned evidence was improperly obtained. The issue is whether the evidence ought to be excluded pursuant to s 30(2)(b) of the EA.

### **Section 30(3) of the Evidence Act 2006**

*The importance of the right breached and the seriousness of the intrusion on it*

[52] I have found that both [FB] and [BA]’s s 18(2), s 21 and s 22 NZBORA rights were breached. The rights that were breached are important. I take into consideration the following:

- (a) A breach of s 22 will normally count in favour of exclusion of the impugned evidence.<sup>34</sup> [FB] and [BA] were detained in a car park beside the road. There was no direct evidence as to the length of the detention, however I consider it was at least for several minutes. That is, the time it took for [the second Constable] to inspect the car until the point the search for firearms was invoked.
- (b) [FB] is a young person. He was not given his youth rights before being questioned by [the second Constable] about the firearm barrel as he should have been.<sup>35</sup> It was [the second Constable]’s evidence that [FB] admitted to ownership of the firearm.<sup>36</sup> However, [FB] disputes making that admission.<sup>37</sup> I do not need to determine whether such an admission was made given the police acceptance that [FB] was not given his youth rights until after the first SSA search was invoked. I consider the failure to give [FB] his youth rights makes the intrusion on his rights more serious.
- (c) [FB] was arrested and handcuffed after the first SSA search for firearms. The validity of the arrest has not been challenged. However, I consider the police were in breach of s 214 of the Oranga Tamariki

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<sup>34</sup> *R v Maihi* (2002) 19 CRNZ 453 (CA).

<sup>35</sup> Oranga Tamariki Act 1989, s 215.

<sup>36</sup> NOE at page 12, line 17.

<sup>37</sup> NOE at page 70, line 20.

Act 1989 in electing to arrest [FB] rather than issuing a summons. This is a further intrusion on [FB]'s rights.

- (d) The search of [FB]'s car involved a less serious intrusion on his right to privacy than a search of a home.
- (e) The search of [BA]'s person is an intrusive search.

[53] The points above favour exclusion.

*The nature of the impropriety*

[54] The stopping and inspection of the vehicle were not for the purposes of the LTA. Despite [the second Constable]'s evidence that the inspection was undertaken to check the safety of the vehicle, I consider it was in effect a search to facilitate investigation into car crime and burglaries.

[55] I consider [the second Constable]'s actions were reckless in that he showed a lack of care and caution. He ought to have known the power to stop and inspect the car did not exist in the circumstances.

[56] [BA] was detained while his details were taken. [The first Constable] did not appear to be aware that he was not able to require the details of passengers or that he had no power to detain [BA].<sup>38</sup> I consider [the first Constable] was careless in this regard. The above favours exclusion.

*The nature and quality of the evidence*

[57] The impugned evidence is important to the police case. This is a relevant factor towards the need for an effective and credible system of justice. This favours admissibility.

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<sup>38</sup> NOE at page 67

*The seriousness of the offences*

[58] Seriousness is to be gauged by reference to how serious the offence charged is.<sup>39</sup> In respect of [FB] the firearm was not operational, the quantity of cannabis was not large. Depending on [FB]’s compliance with a family group conference plan a discharge pursuant to s 282 of the Oranga Tamariki Act cannot be excluded if the charges are not denied.

[59] In respect of [BA] the magazine contained ten rounds of ammunition. The offences are moderately serious.

[60] The seriousness of the offences is a neutral factor.

*Other techniques and remedies*

[61] This factor is irrelevant as the evidence was located because of a search prior to which there was no indication of offending.

*Alternative remedies*

[62] There are no alternative remedies available.

*Was there urgency in obtaining the improperly obtained evidence?*

[63] There was no urgency in conducting the search. A warrantless search was not required in the circumstances.

**Conclusion**

[64] I have concluded that the evidence ought to be excluded. The rights breached were fundamental. [The second Constable] ought to have known that the circumstances did not permit an inspection of the vehicle. Exclusion of the evidence is proportionate to the impropriety.

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<sup>39</sup> *Hamed v R* [2011] NZSC 101 at [241].

Judge S Patel  
Youth Court Judge

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