

**SUMMARY OF THE EVIDENCE IN THE TRIAL OF
DARREN VAN DONGAN**

1. Darren Van Dongan was charged with resist public officer, hinder public officer and possession of methylamphetamine and proceeded to a summary trial before Magistrate Roberts in the Midland Magistrates court on 9 February 2006.
2. The salient facts of the alleged offences were as follows;
 - On 2 August 2005 Senior Constables Hush and Webb of the Gang Crime Squad were travelling in a marked police vehicle on Great Northern Highway near Bullsbrook. They met with other police officers who had set up a road block in order to conduct random breath tests on passing motorists. At that location police signalled a group of six motor cycle riders, one of whom included the Defendant Darren Van Dongan. The Defendant was duly breathalysed and then told he was free to go.
 - Shortly thereafter Senior Constable Hush recognised the Defendant, approached him and said words to the effect of "*Darren I am going to search you for drugs*". There was some preliminary searching of the Defendant's clothing before an argument commenced between Senior Constable Hush and the Defendant about, firstly, the search of the Defendant's "*colours*" and then secondly, about the search of his wallet. The Defendant refused to allow the search of his wallet prompting Senior Constable Hush to reply "*we've been through this before Darren*".
 - Senior Constable Hush then advised the Defendant that if he did not comply with the search he would be arrested. When the Defendant stated "*well then arrest me*" Senior Constable Hush proceeded to attempt to place the Defendant in handcuffs. A short struggle then ensued between the Defendant and other police officers during the course of which a 'Taser' gun was deployed on the Defendant. The Defendant's conduct during the course of the search and subsequent struggle constituted the charges of hinder public officer and resist public officer.
 - After the Defendant was placed in handcuffs his wallet was searched and was said to contain a small amount of methylamphetamine inside a clipseal bag. That amount constitutes the charge of possession of a prohibited drug.

**MANNER IN WHICH THE SUMMARY TRIAL
PROCEEDED**

3. The first thing to note is that prior to the commencement of the summary trial there was no issue raised by the defence as to the lawfulness of the search of

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the Defendant. It is unclear from the transcript whether the prosecutor was on notice that the lawfulness of the search was going to be disputed.

4. In his evidence in chief Senior Constable Hush did not state what "*reasonable grounds*" he had to search the Defendant. He was not asked to state those grounds by the prosecutor. The evidence was simply that Senior Constable Hush was stationed at Gang Crime Squad, that he recognised the Defendant and that the Defendant was a member of the Gypsy Jokers Motor Cycle Club. Having recognised the Defendant Senior Constable Hush then said "*Darren I am going to search you for drugs*".
5. In cross-examination of Senior Constable Hush defence put to him that there was a history between Hush and the Defendant. There was evidence that Hush had a prior dealing with him concerning drugs. It is apparent from the cross-examination that the prior incident involved charges that were heard in the Armadale court and that the Defendant was ultimately acquitted of those charges. Hush said "*That's why I had the experience and I'm aware that he ..., he has a dealing for drugs and so on*". During the course of the cross-examination the Magistrate intervened asking defence counsel "*do you want to go down this road?*" In re-examination Senior Constable Hush was not asked about what reasonable suspicion or reasonable grounds he had in regards to the Defendant prior to searching him.
6. Several other police witnesses present at the time were called to give evidence however none of that evidence really impacts upon the question of Senior Constable Hush's "*reasonable grounds*" or "*reasonable suspicion*". The remaining evidence concentrated on the manner in which the 'Taser gun' was deployed and other supposed inconsistencies in the officers' recollections of events.
7. The Defendant gave evidence and denied resisting arrest and hindering the Police. He denied that the methylamphetamine was in his wallet and effectively alleged that the Police planted the drugs on him. The Defendant was asked in examination in chief whether he had had any dealings with Senior Constable Hush before to which he replied that he had, "*about 2 years ago*". He was not asked any further details about that prior dealing (that concerned a drug matter heard in the Armadale Magistrates Court involving Senior Constable Hush) and in cross-examination of the Defendant he was not asked anything about the prior dealing between himself and Senior Constable Hush.

COUNSEL'S FINAL SUBMISSIONS AND THE MAGISTRATE'S DECISION

8. During the course of defence counsel's submissions he stated the following;
 - o "*But they're the ones (the prosecution) that need to show that they have reasonable grounds*".

- *“So you have got a situation where the police are supposedly, in terms of the offences, first of all, to hinder the police they have to be acting in the execution of their duty. The officer says, “I want to search you for drugs.” Well, that’s not the end of it. I mean, if any officer can just walk up to a person and say, “I want to search you for drugs,” then we’ve got a strange system. They need to show that they had reasonable grounds for that”.*
 - *“When it comes to the drugs there are some real difficulties with this, because what happened is the police officer want your Honour to believe that they were out there for a search. They were searching for drugs. They had five cars and they didn’t have one drug bag.”*
9. The issue of whether the search was lawful and proper on the basis that Senior Constable Hush did or did not have a reasonable suspicion and/or reasonable grounds for conducting the search, having been raised for the first time in defence counsel’s closing address, was then further discussed between defence counsel, the prosecutor and the Magistrate.
 10. The Magistrate then asks the prosecutor *“How can you establish that there is a reasonable suspicion?”* to which the prosecutor concedes that if the court is not satisfied on the evidence of Senior Constable Hush that he had sufficient reason to search him on the evidence then the case would fail.
 11. His Honour then raised the issue that the police have to have reason other than the fact that they are *“a marked group”* (referring here to the Defendant’s membership of the Gypsy Jokers Motor Cycle Club) that often come to the attention of police. The prosecutor then states *“I suppose the suspicion is by reputation more than anything,but I’m not sure in the identification. But no specific evidence was given as to why Senior Constable Hush had that... ”.*
 12. After that exchange the Magistrate gives his reasons. He states the following as to the issue of the lawfulness of the search;
 - *“But the threshold question at the moment, without delving into all the facts and what transpired, is did Senior Constable Hush have reasonable grounds for requiring the accused person to empty his pockets and search for drugs. He was not examined on that and didn’t give the information that would assist me in working out whether he did have reasonable grounds for suspicion.”*
 - *“As I say, there does not appear to be any grounding at all from Senior Constable Hush as to why he wanted to search him for drugs, and accordingly that raises the issue that the subsequent arrest and dealings were unlawful and that the accused was entitled to resist and not comply with the police requests”.*
 - *“So having regard to all of those factors I do not believe I should exercise my discretion to allow the tainted evidence in under Bunning and Cross Principles. I believe that it should be disallowed. I have*

heard the police must have good grounds to carry out searches and did not have good grounds on the day in question. Well, they may well have but they didn't give evidence of and, of course, the onus is on the prosecution to prove the case beyond reasonable doubt."

13. Prior to the trial there was no indication that defence were disputing the admissibility of the search of the Defendant. That issue was first raised by defence counsel in his closing address and then that theme was taken up by the Magistrate in his reasons. The question of the admissibility of the search should have been raised prior to the trial and then in those circumstances Senior Constable Hush could have been asked and would have had the opportunity of giving further and more detailed evidence as to what the grounds were for his suspicion that the Defendant had, for example, drugs on his person. The prosecutor in his examination in chief did not canvass that issue and in fact in cross-examination, when Senior Constable Hush raised the fact that he had dealt with the Defendant previously in relation to drugs, the Magistrate actually intervened by asking "*Do you want to go down this road?*" There was no further cross-examination or re-examination of Senior Constable Hush as to the grounds creating his suspicion.
14. The Magistrate appears to have erred by coming to the conclusion that he did. The issue of the lawfulness of the search ought to have been raised prior to the trial as a matter of fairness and then that issue could have been fully canvassed. The issue was first raised by defence in their closing address and in those circumstances it was too late for the prosecution to present the evidence of the 'reasonable grounds'.