IN THE DISTRICT COURT
AT ASHBURTON

CRI-2015-003-000490
[2017] NZDC 15411

NEW ZEALAND POLICE

v

RICHARD LINCOLN

Hearing:	19 and 20 June 2017
Appearances:	Mr McRae for the Police Mr Starling and Ms Wham for the defendant
Judgment:	14 July 2017

RESERVED JUDGMENT OF JUDGE J E MAZE

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[1] Richard Lincoln faces four charges: obstruction of a police constable acting in the execution of his duty, possession of cannabis, a class C controlled drug, unlawful possession of a Hatsan shotgun, and unlawful possession of a Panther DPMS rifle. Police assert both firearms are military style semi-automatic firearms (MSSAs), but Mr Lincoln argues they are not. He denies all the charges.

[2] I first record my gratitude to all counsel. All were working under difficulties in different ways. Mr Lincoln had at times been representing himself. All counsel had to deal with difficulties in want or delay of disclosure in accordance with legal requirements, and there were problems with some exhibits. No counsel was responsible for any of those difficulties, and they agreed to continue in the interests of resolution, while maintaining a clear focus on the issues. They also promptly prepared submissions, at times very lengthy, and on short timetables. I am therefore grateful to all counsel for their assistance.

Background

[3] Mr Lincoln held a firearms' licence with an E-category endorsement, with conditions to allow police to inspect storage facilities before taking possession of any MSSA, to notify police within 24 hours of taking possession of any MSSA, and to allow inspection within 72 hours of any such MSSA new to his possession.

[4] Mr Lincoln had arranged in September 2015 to deliver an H and K SL8 firearm (the SL8) to a gunsmith in Christchurch for work. While taking the SL8 to Christchurch from Timaru on 17 September 2015, Mr Lincoln needed to pay for petrol and, later, to use a public toilet. Rather than leave the SL8 unattended in the locked car, he carried it with him on both short excursions. It was not loaded. He held it slung over his shoulder and extending down his side. Once only, in the service station, he briefly moved it round to the front of his body. There is no evidence of it being 'brandished' (paragraph [52] police submissions). There is no evidence Mr Lincoln deliberately "caused" alarm, although there is evidence two witnesses were alarmed. They expressed their concerns to police and provided Mr Lincoln's car description and registration number. Police would inevitably have wanted to make enquiries, and to speak to the driver of that vehicle, to satisfy

themselves that all was in accordance with the law, in the interests of public safety. In September 2014 Russell Tully had taken a firearm to the Ashburton offices of WINZ and murdered two workers and seriously injured another. Reports of Mr Lincoln's actions could therefore reasonably be expected to attract further enquiry from the police.

[5] Senior Constable Manning aided by two other officers performed an "*armed stop*" of Mr Lincoln's car just north of Dunsandel. Mr Lincoln is charged with obstruction of that officer. While this was happening, Sergeant Sutherland entered Mr Lincoln's home in Timaru (the first search). Mr Lincoln was arrested at Dunsandel and taken to the Ashburton police station. He was examined by a mental health assessor and then interviewed by Constable O'Reilly. He was admitted to police bail at about 4 pm, with a condition he must surrender any firearms in his possession to the police. He was driven back to Dunsandel to collect his car. In the mean time Timaru police were asked by Ashburton police to again enter, and search, Mr Lincoln's home (the second search).

[6] Mr Lincoln drove home to 31 Raymond St., Timaru, arriving about 6.30 pm. He met Sergeant Manson on arrival at his home. He informed her he would not surrender any firearms in his possession. She stated she considered he was mentally unfit to have possession of firearms at that time, and she would search and seize any firearms at the address under the Search and Surveillance Act (the third search). Mr Lincoln then discovered that someone had been into his home that day unlawfully. He complained he had been the subject of burglary. When asked to do so, he assisted the police to open the gun safe in the house, stating however his view their actions were unlawful. He started filming the police officers while they moved about his home. Sergeant Manson required him both to stop filming them and to remain quiet while she did certain things. He did as she required. Police seized a Hatsan shotgun (the Hatsan shotgun) and a Panther DPMS rifle (the DPMS rifle) in that third search.

[7] On 23 September 2015 the police in Ashburton filed a charging document alleging obstruction of Senior Constable Manning while he was in the execution of his duty, and unlawfully possessing and carrying the SL8. Mr Lincoln appeared

twice before 2 November 2015, when police in Ashburton filed charges of possession of cannabis and two charges of unlawful possession of MSSAs (one relating to the Hatsan shotgun and the other to the DPMS rifle). On 23 November 2015 Mr Lincoln pleaded not guilty to all six charges. On 19 June 2017, I dismissed the two charges in relation to the SL8 when police offered no evidence.

[8] Whether the DPMS rifle and the Hatsan shotgun are MSSAs is the subject of evidence from two competing experts, Mr Ngamoki for the police and Mr Woods for the defendant. They were both called during the police case by consent and for convenience of the witnesses and the Court; I understand this was without prejudice to the right to submit there was no case to answer on any charge, and no issue has been taken on that score. Mr Lincoln denied there was a case to answer on all but the charge of obstruction. At the same time he indicated formally that he elected to call no further evidence, allowing me to reserve the decision on both whether there was a case to answer and, if so, whether there was proof beyond reasonable doubt.

Timeline

[9] I found it helpful to list the alleged events in the sequence emerging from the evidence, along with my own observations, as follows :

17 September 2015

At an unknown time in the morning John Wainwright (arms officer for police) inspected the DPMS rifle and Hatsan shotgun. (Plainly this date is wrong and it must have been at least one, and possibly even more, days after 17 September.)

8.25 am the defendant went to NPD service station in Timaru. When he went to pay for his petrol, he carried the SL8 with him as described above. He drove away after paying. The attendant reported the car registration to Police (Suzuki DUT511).

9.30 am Constable Savage at Rolleston heard of the event in Ashburton and the registration of the Suzuki DUT51. He drove towards Ashburton.

9.50 am Senior Constable Manning was directed to drive from Lincoln to Ashburton to locate the Suzuki DUT511.

Around 10 am S/C Manning used "an armed stop" to stop the Suzuki DUT511 about 3 kms north of Dunsandel on SH1. He was joined by Constables Savage and Lewis. Senior Constable Manning directed Mr Lincoln to get out of the car with his hands held above his head, and kneel on the grass verge. Mr Lincoln complied with all directions without delay but complained of discomfort while doing so. When asked, Mr Lincoln explained why he had the SL8 in the car and why he had taken it with him when he left the car.

10.19 am Constable Lewis searched Mr Lincoln's car and removed the SL8.

10.30 am Sergeant Sutherland of Timaru police was sent to 31 Raymond St, Timaru to "check the address to which the vehicle (DUT511) was registered", to see if the registered owner still lived there and to find out who had the vehicle at the time. Sergeant Sutherland was then told before he reached the address that police had arrested Mr Lincoln. After knocking and receiving no reply, the sergeant broke a cracked but intact window to enter the house at 31 Raymond St. He walked into the kitchen, living room and hall, and then left the house. He entered the house because from outside he could see something which he believed, despite what Mr Lincoln had said, might be a body. It was in fact, as Mr Lincoln had said, nothing but a pile of clothing. I accept that if Sergeant Sutherland thought he <u>might</u> be looking at a body, then reasonably he would want to be sure it was not one. He would have expected serious criticism if he had not done so, and there had, in fact, been a person lying on the floor. Sergeant Sutherland also however entered the hall, and he removed and photographed mail from the letterbox before leaving the address, neither of which was reasonably necessary for the enquiry into whether a body lay on the floor of the living area.

10.40 am Mr Lincoln was seen going into the public toilets in Ashburton, carrying the SL8, and then he returned to the car and drove off. This witness is unreliable as to time, as by then Mr Lincoln had been arrested at Dunsandel.

10.55 am Constable O'Reilly received Mr Lincoln in the Ashburton police cells.

11.30 Constable O'Reilly arranged for a mental health assessor to assess Mr Lincoln in the cells.

12.55 pm Constable O'Reilly interviewed Mr Lincoln, recorded on DVD. Constable O'Reilly described Mr Lincoln's behaviour between 11 am and 4 pm (the entire time Mr Lincoln was at the Ashburton police station) as being the same as shown in the recorded interview.

3:00 pm Sergeant Scott of Ashburton (not a witness) telephoned Sergeant Sutherland in Timaru. As a result of what Sergeant Scott said, Sergeant Sutherland considered (without having met Mr Lincoln) that Mr Lincoln was not in a fit mental state to possess firearms.

4:00 pm Constable O'Reilly admitted Mr Lincoln to bail from Ashburton police station, with a condition he was to surrender any firearms remaining in his possession to police. I have not seen the bail bond and do not know on what charge or charges he was bailed. Police drove Mr Lincoln to Dunsandel to collect his car (about half an hour's drive). They knew of his intention to drive from Dunsandel to Timaru (about one and half hour's drive) on State Highway 1.

4:00 pm Sergeant Sutherland and Constables Wightman and Parsons (Timaru police officers) went to 31 Raymond Street, Timaru. They re-entered via the broken window and conducted a search without warrant, removing a shotgun, ammunition and a magazine from the house (none of these items is the subject of charges). They entered a house bus, removing from a gun safe a rifle stock and ammunition (again not the subject of charges). They entered a locked garage and removed a blue plastic ice cream container with a snap lock bag containing plant material (relied upon for the charge of possession of cannabis). Based on his many years' experience the sergeant identified the plant material as cannabis, but he did not know whether it contained cannabis resin and it was never analysed.

4.42 pm Constable Wightman left 31 Raymond Street, Timaru.

6.28 pm Sergeant Manson met Mr Lincoln outside 31 Raymond St, Timaru. Mr Lincoln declined to surrender his firearms. Sergeant Manson informed him she was exercising the power to search under the Search and Surveillance Act because she believed he was not mentally fit to be in control of firearms. She knew the defendant was on police bail, but said she did not know police had imposed a bail condition that he surrender his firearms. While inside the house, Sergeant Manson ordered the defendant to stop filming the police in attendance, and, later, to keep quiet. The defendant did as he was told.

6.35 pm Constable Wightman accompanied Sergeant Manson to 31 Raymond St. He said Sergeant Manson had told him that the defendant was subject to a bail condition requiring him to surrender to police any firearms in his possession. He heard Sergeant Manson tell Mr Lincoln however that she was exercising a power under the Search and Surveillance Act to search for firearms. Mr Lincoln assisted Constable Wightman to open the locked arms safe, but complained their activity was unlawful. Constable Wightman seized the DPMS rifle and the Hatsan shotgun. Constable Wightman seized other firearms (not the subject of charges). Constable Wightman also found on a separate shelf in the safe a collection of magazines (large and small) and in an upper locked box some ammunition. This upper box had a separate lock and key. Constable Wightman could not remember whether the DPMS rifle had a magazine fitted to it when he seized it, but he did not recall removing one, nor did he fit one; he merely seized it as it was, therefore, and securely stored it as an exhibit when back at the station.

9:00 pm Mr Lincoln attended the Timaru police station and left a letter for Inspector Gaskin. He also said he had had the broken window repaired.

On or after 18 September 2015 Sergeant Sutherland photographed the DPMS rifle as shown in photos 10, 11, 12 and 13. No police officer who gave evidence could remember whether the small magazine already fitted to the DPMS rifle in those photographs was in it when it was seized. However they said they would not have fitted a magazine to it and none could remember removing a magazine from it. On the evidence then that small magazine must have been in the DPMS rifle when it was found and seized.

23 September 2015 police filed charges of obstruction and unlawfully carrying and possessing the SL8.

2 November 2015 police laid the charge of possession of cannabis and two charges of unlawful possession of MSSAs.

23 November 2015 Mr Lincoln pleaded not guilty to all six charges.

18 January 2016 Mr Wainwright sent the Hatsan shotgun and DPMS rifle to the armourer to confirm his own conclusions they were MSSAs. He later sent the large magazines to the armourer, but decided not to send the small ones.

19 January 2016 the armourer received and examined the DPMS rifle and Hatsan shotgun. He received the package of large magazines at a later date. The armourer had never seen the smaller magazines before giving evidence on 19 June 2017. He was able to fit into the DPMS rifle the same small magazine as was in the rifle when Sergeant Sutherland photographed it in September 2015. None of the other small magazines fitted the DPMS rifle.

19 June 2017 police offered no evidence on the two charges relating to the SL8 and they were dismissed.

[10] **The questions for me are**:

- Has the charge of obstruction been proven beyond reasonable doubt?
- Is there a case to answer on the possession of cannabis?
- If there is a case to answer on the charge of possession of cannabis, is it proven beyond reasonable doubt?
- Is there a case to answer on the charges of unlawful possession of the DPMS rifle and the Hatsan shotgun?
- If so has it been proven he was in unlawful possession of either or both?

Has the charge of obstruction been proven beyond reasonable doubt?

[11] There are three witnesses to this alleged event, Senior Constable Manning, Constable Savage and Constable Lewis.

Senior Constable Manning's version:

[12] Senior Constable Manning denied Mr Lincoln had answered his questions, and yet recounted Mr Lincoln's answers in his evidence. The officer refused then, and in evidence in chief, to accept those answers, but his own evidence shows Mr Lincoln provided an explanation, in both fact and law, for his actions, demonstrating, in the process, clear and rational thinking. The failure to present evidence in support of the charges relating to the SL8 confirms that, by 19 June 2017 at least, police accepted Mr Lincoln had not committed the SL8 alleged offences. The officer's evidence that "*It's not the normal way we talk to people is it? We don't talk in sections and regulations. We talk in words and explain things...*" is incomprehensible to me. Mr Lincoln was asked to explain what he had been doing and why, and he did. When the officer repeated his questions, understandably, Mr Lincoln repeated his answers. The evidence therefore establishes that Mr Lincoln was entirely rational at the time, and it is now apparently accepted he was correct (or reasonably likely to be correct) in those answers he gave. His complaint about his treatment is itself rational in the circumstances.

[13] Senior Constable Manning said Mr Lincoln was then "*stood back up*". The officer was "*trying to talk to him*" and Mr Lincoln was behaving "*quite irrationally and aggressively*". The senior constable said he wanted to talk to Mr Lincoln to get an explanation, and he wanted to control Mr Lincoln while the others searched the car. Then it became obvious, he said, that Mr Lincoln was not going to let the senior constable stay between himself and the car. Mr Lincoln "*got in [the officer's] face*" so that there was about 10 centimetres between their noses. The officer said he had to have control over Mr Lincoln, so he raised his hand in front of him, touched Mr Lincoln's shoulder and arrested him.

[14] However I was able to see in Court the body shape of both Mr Lincoln and the officer. For them to be about 10 cms apart, nose to nose, their bodies would otherwise have been touching elsewhere, particularly at chest and stomach level. That would have made the officer's stated arm and hand movements very difficult, if not impossible. When faced with that in cross-examination, the senior constable said he himself may have stepped backwards. At times he denied their bodies had been touching before the arrest, but then said that they were. However Constable Savage said the two men were up to half a metre apart when Mr Lincoln was arrested. I find the senior constable's evidence as to the distance between himself and Mr Lincoln neither credible nor reliable.

[15] Constable Savage said that he stood near the senior constable throughout the exchange (refer exhibit 2A); it was Constable Lewis who searched the car. If that were true, Mr Lincoln could not move closer to the car, and Constable Savage described no attempt to do so. At a distance of some four metres from the car, Mr Lincoln did not inhibit or obstruct Constable Lewis in the search. Constable Savage saw the senior constable permit Mr Lincoln to get up off his knees. He then saw Mr Lincoln produce his wallet while protesting he had done nothing unlawful. Senior Constable Manning made no mention of the wallet whatsoever. Constable Savage saw Mr Lincoln then take a step towards Senior Constable Manning, so that they were <u>then</u> up to half a metre apart, at which the senior constable then immediately seized Mr Lincoln's collar (page 51 NOE) and pronounced him under arrest 'for disorderly'. Based on that evidence, it is open to conclude that when he took a step closer, Mr Lincoln was holding his wallet for the purpose of showing the senior constable something, as part of the continuing response to the officer's repetition of the same questions.

Constable Savage's version:

[16] Constable Savage heard Senior Constable Manning tell the driver to get out of the stopped car. The driver was compliant, he said, but when told why he had been stopped, he became 'argumentative'. Constable Savage however gave no direct evidence of an argument; his report of Mr Lincoln's words reveals the explanation which Senior Constable Manning was asking for. Mr Lincoln complained about

getting wet clothing from kneeling on the grass and was permitted to stand. He said they had no right to treat him that way. Mr Lincoln then produced his wallet and 'became aggressive' at which he was arrested. Constable Savage later explained this aggression, saying Mr Lincoln had 'puffed up', 'with basketball arms' and 'clenched fists' immediately before he was arrested.

[17] That version was not supported in any way by Senior Constable Manning, who said the aggression was Mr Lincoln stepping forward to stand ten centimetres nose to nose, bodies basically touching (although that last point varied through his evidence). On what the arresting officer said, Constable Savage's version was impossible.

[18] The inherent inconsistencies between the two officers' accounts make it impossible to rely upon either, as I have no evidential basis to prefer one version over the other.

[19] Constable Savage's analysis [pp 52 and 53 NOE) blurs the two offences of disorderly behaviour and obstruction. He described no action to support an arrest for disorderly behaviour.

Constable Lewis's version:

[20] Constable Lewis assisted in applying the handcuffs and was therefore in close proximity to the events preceding the arrest (p 62 NOE). He too heard that the arrest was for disorderly behaviour (not obstruction). He saw and heard nothing to constitute either obstruction or disorderly behaviour (p 65 NOE). He observed Mr Lincoln to be calm and measured. The logical conclusion to be drawn from his evidence is that he saw no offence because no offence had occurred. All that he observed was 'a robust conversation', in which Mr Lincoln implied or expressed the view that Senior Constable Manning did not appear to know the relevant law (a point conceded in evidence by Senior Constable Manning himself). I am satisfied that the senior constable kept repeating his questions and Mr Lincoln kept repeating his answers. Mr Lincoln may have raised his voice, but that is not obstruction.

Mr Lincoln repeated himself but that is not obstruction. Complaining of unfair and unjustified treatment (as he saw it), is neither aggression, nor obstruction.

[21] It is difficult to define what 'duty' Senior Constable Manning would have had, or had, difficulty fulfilling. He had asked for, and had received, the same explanation several times. The officer said his aim was to *control* Mr Lincoln while someone else searched the car. Mr Lincoln was clearly under *control* because Constable Lewis said so, and there is no reliable or credible evidence to the contrary.

[22] It will be apparent then that although there is technically a case to answer (if Senior Constable Manning's evidence could be accepted), that evidence is self-contradicted, and contradicted by others, and therefore lacks credibility and reliability. Mr Lincoln did not act as Senior Constable Manning alleged. Neither did he act as Constable Savage alleged. I am satisfied Mr Lincoln did nothing to amount to obstruction of Senior Constable Manning. That charge must be dismissed.

Is there a case to answer on possession of cannabis ?

[23] It is an offence under the Misuse of Drugs Act 1975 to possess the Class C controlled drug cannabis.

Is the evidence of finding plant material admissible?

[24] Is there admissible evidence the plant material was found in the garage? Mr Starling submits the second search of Mr Lincoln's home and garage was unlawful, evidence of finding plant material was therefore improperly obtained, and it should be ruled inadmissible. Mr McRae submits the plant material was found during a lawful search under s 18 Search and Surveillance Act 2012. He says the search was lawful, because Sergeant Sutherland had reasonable grounds to suspect, either, that by reason of his physical or mental condition, Mr Lincoln was incapable of having proper control of arms, or, that he was in breach of the Arms Act. Mr McRae also submits that when Mr Lincoln accepted the bail condition, he authorised this search. Police say therefore the plant material was found during a lawful search and evidence of that is admissible.

[25] Mr Lincoln had agreed to a bail condition, at or about 4 pm 17 September 2015, that he would surrender any firearms then in his possession to the police (the bail condition). At about the same time, in Timaru, Sergeant Sutherland and others entered Mr Lincoln's home via the broken window and searched Mr Lincoln's home, the house bus and the garage, when Mr Lincoln was ignorant of that. I cannot accept that by signing a bail bond, containing the bail condition, Mr Lincoln had granted a licence to the police to enter and search his home. The terms of surrender of the firearms had been agreed with Ashburton police; Mr Lincoln had not at that stage breached that agreement. More importantly Sergeant Sutherland did not purport to break into Mr Lincoln's home because Mr Lincoln had breached the bail condition. I reject the police submission that Mr Lincoln had authorised the police search of his home when he signed the bail bond.

[26] Sergeant Sutherland said he relied on what Sergeant Scott told him, that Mr Lincoln had, by his physical or mental condition, shown himself to be incapable of exercising proper control over firearms in his possession. Sergeant Sutherland had no opportunity to assess Mr Lincoln for himself before he was asked to conduct the second search. The only possibly credible and reliable evidence from events at the roadside in Dunsandel (that of Constable Lewis) shows that Mr Lincoln had displayed nothing but rational and compliant behaviour. Mr Lincoln had an explanation for his actions in Timaru and Ashburton with the SL8 (one accepted by police by 19 June 2017). Constable O'Reilly said Mr Lincoln's behaviour was consistent while in Ashburton police station and was the same as he displayed in the recorded interview. He was obviously rational in interview. As Constable O'Reilly arranged a forensic assessment before the interview, Constable O'Reilly must have been satisfied Mr Lincoln was not unfit to be interviewed. I am confident that, if, in that interview, Mr Lincoln confessed to any offence, the police would have presented evidence of that confession as a competent and voluntary statement against interest. Therefore, objectively there was no evidence of physical or mental impairment which could justify Sergeant Scott's (or Constable O'Reilly's) stated conclusion that Mr Lincoln lacked the mental capability properly to control firearms in his possession.

[27] Under s 18 Search and Surveillance Act 2012 the officer exercising the right to enter, search and seize, must himself suspect, and have reasonable grounds to suspect, the existence of one or more of the circumstances set out in s 18(2). Reasonable grounds for suspicion require the suspicion to be "inherently likely". Speculation or concern is not enough. The evidence must disclose that in fact Sergeant Sutherland suspected mental incapacity, and that it was reasonable to do so. Sergeant Sutherland said he relied upon his suspicion Mr Lincoln had a mental condition leading to his incapacity for proper control of firearms. The question is whether the sergeant had reasonable grounds to form that suspicion. Sergeant Sutherland could rely upon hearsay (or the opinions of others), if he considered it sufficiently reliable *(Rural Timber v Hughes* [1989] 3 NZLR 178), but if it was in fact unreliable, and ought to have been questioned, then, viewed objectively, there would not be reasonable grounds for the suspicion. The credible and reliable evidence establishes Mr Lincoln had behaved rationally that day, and there was in fact no evidence of physical or mental impairment. All evidence pointed to the reverse. Sergeant Sutherland's suspicion depended entirely upon the, in fact, unsupported statements of other officers. He was however also informed Mr Lincoln had been interviewed (p 155 NOE), and would shortly be released on bail to drive himself back to Timaru from Dunsandel. This in itself should have alerted Sergeant Sutherland to consider whether Sergeant Scott's assessment was unreliable or unjustified, and should be tested.

[28] Police submit that Sergeant Sutherland may have relied upon Mr Lincoln being in breach of the Arms Act and also upon a 'statement' relayed to him that he would find a firearm within the bedding in the bedroom. There was no other evidence, and no record, of that statement having been made by anyone. Sergeant Sutherland did find a 'firearm' in the bedding (I was not told whether it met the definition of a firearm, and it is not the subject of charge). The Sergeant had not in fact seen it until the second search, but he said he was told about that before he began the second search and he relied upon that as part of his grounds for searching under s 18. However it is not recorded in his job sheet or other relevant records (pp154 and 155 NOE). Had such a statement been made, a record would show who made it and to whom; it is too relevant to leave it wholly undocumented by everyone. In light of all the events during that day, the passage of time since, and the

inevitable discussions about this matter over 21 months, it has to be reasonably possible the sergeant is simply mistaken about this point. His efforts to rationalise the paperwork (p 156) raise more questions than answers. I find as a fact no statement was made to Sergeant Sutherland, when he was asked to conduct the second search, that he would find a firearm within the bedding. I am also satisfied that at or about 4pm on 17 September 2015 Sergeant Sutherland had no other information that Mr Lincoln was then in breach of the Arms Act. The present tense is used in the test under s 18(2)(a). Whatever offence/s the police suspected had occurred earlier in the day, the evidence discloses no basis at all to suspect that Mr Lincoln was at that time likely to be in breach of the Arms Act. Any other firearms in his possession were the subject of an agreement. Further Mr Starling is correct that the police cannot rely upon what was a clear error in relation to the SL8 firearm to justify their position.

[29] Therefore Sergeant Sutherland relied entirely upon the reported opinions of others. The police must establish both that Sergeant Sutherland himself suspected the requisite mental incapacity in Mr Lincoln, and that it was reasonable for him to have that suspicion. He could not merely delegate that assessment; once a statute requires a particular person to reach specified conclusions, that person must discharge that duty him or herself (see para [57] in *R v Peta* [2007] NZCA 28).

[30] I note also *Rimine v R* [2010] NZCA 462, in which the same test ("reasonable grounds to suspect"), but in the context of s 60 Arms Act, was not satisfied where there was intelligence information available to the officer and the defendant's demeanour was described as 'nervous'. The Court said:

> *Looking at the matter in the round, and acknowledging the tension caused by concerns that firearms may be involved in any interaction with a police officer, we do not consider that the information available to Senior Constable Todd was sufficient to found the reasonable suspicion that s 60 requires. .....The combination gave some basis for concern but, in our view, it fell short of the reasonable suspicion standard.*

[31] Sergeant Sutherland should have been told that Mr Lincoln had been assessed by a mental health assessor, and was not considered unfit for police interview. Sergeant Scott had a duty to inform Sergeant Sutherland of all relevant matters, and, as he knew that Mr Lincoln was about to be bailed and was two and a half hours

drive away from Timaru, he should have told Sergeant Sutherland that also. I am not told whether alternatives to a s 18 search were considered; there was time to obtain a search warrant (if grounds existed for one), and the police could lawfully have presented Mr Lincoln to the Court for an opposed bail application. I find in the circumstances that Sergeant Sutherland did not have reasonable grounds to suspect Mr Lincoln was incapable of having proper control of firearms by virtue of his physical or mental condition. The search, by which evidence of plant material was found in the garage, was therefore unlawful. I am also satisfied that it was unreasonably executed in the way entry was gained, the extent of the search, and the fact police had time to consider other options. It was a second warrantless search of the same premises on the same day even though nothing compromising had been found in the first search.

[32] Under s 30 Evidence Act the evidence of finding the plant material must be inadmissible. The charge is a minor one alleging possession of just 12 grams of cannabis plant material. Other options were available to the police. There was no urgency. Mr Lincoln was released on bail by police with an agreement to meet with him at his home. The breach of privacy is a serious one, relating to Mr Lincoln's home and private property. Public interest, in the circumstances, requires exclusion. The evidence is inadmissible. Without that, the charge is unsupportable and must be dismissed because there is no case to answer. However in the event I am wrong in that I consider two remaining matters, was it cannabis, and if there is a case to answer, was it proven beyond reasonable doubt it was in the possession of Mr Lincoln?

Is there evidence from which the Court could find the plant material was cannabis?

[33] Schedule 3 to MODA defines cannabis for the purposes of the Act as any part of any plant of the genus *Cannabis* except a part from which all the resin has been extracted.

[34] Oddly in this case police seized the plant material but did not have it analysed forensically. It was produced in Court in a sealed thick windowless envelope. It had a small hole from which fine particles emerged when I held it. It was not opened in Court. Ashburton police told Sergeant Sutherland they would deal with this charge and any evidence relating to it. Sergeant Sutherland said that, based on his experience over many years, when he saw it on 17 September 2015, it looked to be cannabis. He also noted that on top of the container he found a pipe and a lighter, and the container was in an old fridge with a hole cut in the side wall (and in the sergeant's experience such an adaptation is commonly linked to cultivation of cannabis, although there was no sign of that here). However as the sergeant himself said, if he had been left to deal with the material seized, he would have had it analysed. That would be the correct step to take, but Ashburton police did not do it. His answer implies acceptance it is reasonably possible his own recognition and description may not be enough to meet to the required standard the definition of cannabis. Furthermore he admitted that he is unable to say whether it then contained resin (pages 163 and 164 NOE). Plainly when the sergeant said he was unable to say whether there was resin in the plant material, then there is no evidence the plant material is both of the genus cannabis and contained resin. I cannot infer that. Therefore no evidence is given to address the definition of cannabis. However even if there was a case to answer, it would nevertheless not be sufficient for proof beyond reasonable doubt that, as at 17 September 2015, this plant material met the definition of the Class C controlled drug cannabis.

[35] Finally the evidence discloses three people received mail at the address (Steven Dyce, Stephanie Dyce and Richard Lincoln). The police assert possession by Mr Lincoln was accepted. That is not the case; he denied the charge, and specifically consented to admission of the police-led evidence that three different people had received mail at the address on the day of the searches. That gives rise to the likelihood three people lived there. Mr Lincoln did not assert he lived there alone. The onus of proof is on the police to prove Mr Lincoln possessed the contents of that box. The presence of a facsimile ammunition shaped lighter may be relevant (but is at best ambivalent in the context of the available evidence). Mr Lincoln's fingerprints were not found on the box or the lighter. In the absence of something more concrete to link this defendant to that container and its contents, it would be

impossible for me to conclude, beyond reasonable doubt, Mr Lincoln (and not one of the other people probably living there) possessed that blue container and the within plant material.

[36] The charge of possession of cannabis must also therefore be dismissed, firstly because there is no case to answer, or, alternatively and in any event, because it is not proven beyond reasonable doubt.

Is there a case to answer on the charges of unlawful possession of firearms?

[37] Mr Starling submits there is no admissible evidence that the defendant possessed the Hatsan shotgun and the DPMS rifle. He also submits that, even if the evidence is admitted that Mr Lincoln was found in possession of them, the evidence, at its highest for the police, shows he was the holder of a firearms licence with an E endorsement (p 226 NOE). No record of Mr Lincoln's applications or of the licence and endorsement was produced. Mr Wainwright stated what he understood conditions of that endorsement were, and his evidence implied the endorsement/s could cover more than one MSSA firearm. Mr Starling therefore submits that, even if, ultimately, the Court were to hold the Hatsan shotgun and DPMS rifle to be MSSAs (which Mr Lincoln denies them to be), and Mr Lincoln was in possession of them, the only evidence is that Mr Lincoln held a licence with an endorsement for one or more MSSAs.

[38] The offences are charged under s 50(1)(b) of the Arms Act 1983. That section provides:

> **50 Unlawful possession of pistol, military style semi-automatic firearm, or restricted weapon**
>
> (1) Every person commits an offence and is liable on conviction to imprisonment for a term not exceeding 3 years or to a fine not exceeding $4,000 or to both who—
>
> (a) is in possession of a pistol and is not a person authorised or permitted, expressly or by implication, by or pursuant to this Act, to be in possession of that pistol; or
>
> (b) is in possession of a restricted weapon and is not a person authorised or permitted, expressly or by

implication, by or pursuant to this Act, to be in possession of that restricted weapon; or

(c) is in possession of a military style semi-automatic firearm and is not a person authorised or permitted, expressly or by implication, by or pursuant to this Act, to be in possession of that military style semi-automatic firearm.

(2) It is not an offence against this section to be in possession of a pistol that is an antique firearm.

(3) In any prosecution for an offence against subsection (1) in which it is proved that the defendant was in possession of a pistol, military style semi-automatic firearm, or restricted weapon, the burden of proving that the defendant was authorised or permitted, expressly or by implication, by or pursuant to this Act to be in possession of that pistol, military style semi-automatic firearm, or restricted weapon shall lie on the defendant.

(4) It is a good defence to a prosecution for an offence against subsection (1)(a) if the defendant proves—

(a) that he is the holder of a firearms licence; and

(b) that he has owned the firearm to which the charge relates since before 16 May 1969; and

(c) that, immediately before 16 May 1969, he was registered under section 9 of the Arms Act 1958 as the owner of that firearm; and

(d) that, although that firearm is less than 762 millimetres in length, it has not been reduced below that length since 15 May 1969 and is not designed or adapted to be held and fired with 1 hand.

(5) It is a good defence to a prosecution for an offence against subsection (1)(a) if the defendant proves—

(a) that the pistol was in his possession for use both—

(i) on the range of an incorporated pistol club for the time being recognised by the Commissioner for the purposes of section 29; and

(ii) under the immediate supervision of the holder of a firearms licence bearing an endorsement permitting that person to have possession of that pistol or a pistol of that kind; and

(b) that at all times while the defendant was in possession of the pistol he was both on such a range and under the immediate supervision of such a person.

[39] Under s 50 if the prosecution proves beyond reasonable doubt that Mr Lincoln was in possession of the Hatsan shotgun and/or the DPMS rifle, and that either or each is an MSSA firearm, then Mr Lincoln must satisfy me on balance of probabilities that he was authorised under the Act to be in possession of that firearm.

[40] For there to be a case to answer the police must adduce evidence capable of showing that each firearm was an MSSA and that each was in the possession of Mr Lincoln. Mr Ngamoki says both the Hatsan shotgun and the DPMS rifle are MSSAs. Whether that evidence is accepted and sufficient is not for consideration in a submission of no case to answer.

[41] The questions then are:

- Is there evidence, which, if accepted and given the highest possible weight, could permit me to find Mr Lincoln was in possession of the Hatsan shotgun and/or the DPMS rifle?

- If so, has the prosecution proven beyond reasonable doubt for each charge that the firearm was an MSSA firearm ?

- If so, has Mr Lincoln discharged the burden of proof on balance of probabilities he was lawfully in possession of that firearm, or those firearms?

Is there evidence, which, if accepted and given the highest possible weight, could permit me to find Mr Lincoln was in possession of the Hatsan shotgun and/or the DPMS rifle?

[42] This first requires consideration of the third search, undertaken by Sergeant Manson and Constable Wightman. If the Hatsan shotgun and the DPMS rifle were found improperly in the third search then that evidence could only be admitted if it was appropriate under s 30 Evidence Act. Sergeant Manson's search

was conducted under s 18 Search and Surveillance Act (pp168, 191 and 196 NOE). Therefore the evidence must establish that Sergeant Manson had reasonable grounds to suspect Mr Lincoln was incapable of proper control over firearms because of his physical or mental condition (s 18). The sergeant could rely upon hearsay, but its reliability in fact will affect whether it provided objectively reasonable grounds for the suspicion.

[43] Sergeant Manson had the singular advantage of being able to see Mr Lincoln for herself. She described in evidence that Mr Lincoln revoked his consent to surrender any firearms, objected that her search of his home was unlawful, and said he wished to retain evidence of what they were doing by filming them. He did, but stopped when ordered to do so. He stopped speaking to her when she told him to be quiet. He assisted Constable Wightman with opening the locked safe. He made a complaint about a broken window and a burglary. The sergeant acknowledged police were responsible and would pay for the damage to the window. She found it unreasonable that he continued to complain about that. She accused him of delay in obtaining the key to the safe and warned him for obstruction saying her actions were lawful; he then assisted police to open the safe. She described Mr Lincoln's continued complaints about the burglary as 'ranting'.

[44] Sergeant Manson did not suggest she considered Mr Lincoln to be physically incapable of proper control of a firearm. She relied only upon her suspicion that he had a qualifying mental condition. Her evidence however established Mr Lincoln's thinking and behaviour to be entirely rational while in her presence. He observed things which were in fact there to be seen. He complied with the orders he was given. He complied when threatened with arrest for obstruction. He did not claim to see things which were not there. No-one claims he was hallucinating. Sergeant Manson did not identify in evidence any aspect of Mr Lincoln's words or actions which could remotely cause concern that he suffered from a qualifying mental condition. She did use the word 'ranting', but to whom else should he complain about a burglary? Must he necessarily be satisfied that wrongs have been righted if the police pay for the window they broke. The police do not have the sole right to gather evidence where wrong doing is believed to be occurring. He was entitled to express his view they were acting unlawfully, putting them on notice they

did not have his consent. Many victims of alleged burglary repeat their complaint, and express their distress unequivocally. That does not mean those complainants suffer from incapacity arising from a mental condition. Although Sergeant Manson and Constable Wightman described Mr Lincoln as 'ranting' about the burglary, their joint choice of the word reflects their rejection of Mr Lincoln's complaint that police had engaged in wrong-doing. I am not satisfied, based upon her observations at the time, that Sergeant Manson did in fact suspect Mr Lincoln was then suffering from a qualifying mental condition but, even if she did, I am satisfied Sergeant Manson lacked reasonable grounds for any such suspicion.

[45] I also note Sergeant Manson invoked s 18 before Mr Lincoln had seen the broken window and complained of burglary. Therefore, observations Mr Lincoln was 'ranting' after they started to walk up the driveway did not in fact form the basis for invoking s 18. Mr Lincoln met them at the gate, told them they were acting illegally, said he would film them, and asked for their authority. Had he behaved badly after s 18 was invoked (a conclusion which the evidence does not support in any event), that could not have been a ground the sergeant had relied upon when invoking the section.

[46] Sergeant Manson said she also relied upon what she was told by Sergeant Sutherland. This was a brief discussion (p 169 NOE) which appears to repeat what Sergeant Sutherland understood from Sergeant Scott (who did not give evidence). Sergeant Sutherland spoke only to Sergeant Scott (p 157 NOE). Sergeant Manson spoke also to Constable O'Reilly, whose account was much the same as Sergeant Sutherland's. Viewed objectively, as already noted, there could not be anything in Mr Lincoln's reported behaviour (if reported fully and accurately) which could permit her to suspect on reasonable grounds that he lacked the capacity to exercise proper control over firearms by virtue of a mental condition. Taking into account both bases Sergeant Manson said she relied upon (what she was told and her own interactions with Mr Lincoln), her own observations would or should have led her to question the accuracy of what she had been told, and to make further enquiry before considering invoking s 18. I am satisfied the grounds upon which she says she relied for her suspicion were not reasonable grounds for that suspicion.

[47] Police submit that Sergeant Manson had reasonable grounds to suspect a breach of the Arms Act (s 18(2)(a)). The Sergeant said clearly that she relied upon s 18(2)(b) and mental incapacity when Mr Lincoln asked her for her authority to do what she intended to do. She said in evidence

> *"the idea or the main part of the conversation was that he had displayed behaviour that gave the police officers great cause for his mental wellbeing.....just the fact that his behaviour as such there were two different incidents where he'd been seen in public causing concern to the public and police becoming involved and that his reasoning seemed to be unreasonable, that it was concerning to the public and therefore made me form the belief, you know, I suspected that his, that's not the usual behaviour of people, and therefore formed the belief that he was not of sound mind to be in possession of firearms*". (p 169 NOE).

It is not now open to say that the sergeant suspected on reasonable grounds that Mr Lincoln was in breach of the Arms Act 1983 when she invoked s 18. She did not say so, at the time, or in evidence. Neither am I told there was actually evidence available to her at the time she invoked s 18, that Mr Lincoln was <u>at that time</u> in breach of the Arms Act.

[48] I am satisfied the third search was unlawful. I am satisfied it was unreasonable by virtue of the manner in which it occurred, the surrounding constraints placed upon Mr Lincoln and the fact it involved a search of his home. The evidence of finding both the Hatsan shotgun and the DPMS rifle was improperly obtained.

[49] Can the evidence be admissible following the balancing exercise required under s 30 Evidence Act? The impropriety was serious and unnecessary, because it involved:

- a breach of the right to be free from unreasonable search and seizure which took place in Mr Lincoln's home, when there were multiple signs to alert the police to exercise caution. Such breaches are commonly seen as being inherently more, rather than less, serious.
- Police knowledge that earlier in the day Mr Lincoln was not considered unfit to interview following assessment by a medical professional. That fact was not apparently considered relevant by Constable O'Reilly, and appears not to have been relayed to the Timaru officers at all. Those officers dealing with

Mr Lincoln and opining as to his mental state had duties of disclosure of all relevant circumstances to Sergeants Sutherland and Manson. They were not apparently discharged.

- Mr Lincoln's expressed concern for his rights and his opposition to the search, yet not one of the police officers dealing directly with him appear to have attempted to address those concerns in any meaningful way
- Police ignoring their ability to arrest Mr Lincoln for breach of a bail condition. At its highest for the police it could be said Mr Lincoln consented to surrender of his firearms when he signed the bail bond, although the undoubtedly unpalatable consequence of not consenting to that condition was a night in the cells awaiting a court appearance the following day. Sergeant Manson must have known of the bail condition at the time she invoked s 18. She had told Constable Wightman about it. I do not accept however she is lying; police officers, like other witness, forget things. This case has taken twenty-one months to get to trial. Further Sergeant Scott told Sergeant Sutherland Mr Lincoln would, when he met police in Timaru, surrender guns in the gun safe. Sergeant Sutherland told Sergeant Manson that (p 138NOE). It is highly unlikely that the fact that this was a bail condition was not addressed. It would inevitably have been recorded in NIA.
- Police not considering that, should a breach of bail occur, they had sufficient time to arrest him, consider a search warrant application or to seek a bail condition from the Court. There were lawful options available to police to ensure there was no risk Mr Lincoln could have access to firearms in the interim.

[50] The evidence shows no bad faith by either Sergeant Manson or Sergeant Sutherland. Sergeant Scott however influenced the decisions to conduct both the second and third searches, when Ashburton police had reached an agreement with Mr Lincoln, rendering those searches unnecessary at that time. Sergeant Scott ought to have appreciated, when he spoke to Sergeants Manson and Sutherland, there were no reasonable grounds to invoke s 18.

[51] The finding of the Hatsan shotgun and the DPMS rifle is crucial to

the charges.

[52] I am unable to conclude that this is allegedly serious offending based on the guidance in *R v Yeh* [2007] NZCA 580. There is no evidence that Mr Lincoln had produced or used either the Hatsan shotgun or the DPMS rifle in connection with other alleged offending. It is not alleged his possession of them (as a licensed firearms holder) presented a risk to public safety; they were found locked in a gun safe which Constable Wightman needed help from Mr Lincoln to open. Mr Lincoln faces no charges in relation to other (alleged) firearms found at the property, and he held a licence.

[53] The fact that Mr Lincoln seeks damages (a civil action yet to be determined) is not sufficient to conclude the evidence should be admitted because Mr Lincoln has other possibly sufficient remedies available to him. Otherwise all improperly obtained evidence would be admitted, leaving it to a defendant to seek compensation in civil proceedings. That would be to ignore the public interest in promptly recognising the impropriety, and in having an effective and credible system of justice.

[54] Balancing all the above factors, I am satisfied that taking into account the level and nature of the impropriety, the level and nature of the alleged offending, and the s 30(3) considerations, the proportionate remedy is exclusion of the evidence of finding the Hatsan shotgun and the DPMS rifle. There is then no evidence Mr Lincoln was in possession of either the Hatsan shotgun or the DPMS rifle, and no case to answer on either charge.

[55] However, there are other matters I should address. If there had been a case to answer, would the evidence be sufficient for proof beyond reasonable doubt:

- the DPMS rifle was an MSSA firearm?
- the Hatsan shotgun was an MSSA firearm?
- Mr Lincoln was in possession of them?
- Mr Lincoln's possession was unlawful?

[56] If there is evidence from which I could conclude Mr Lincoln was in possession of an MSSA, then it is for the defence to establish on balance of probabilities Mr Lincoln had the requisite authority.

[57] I do not intend to address the lawfulness of the first search. Nor do I need to consider the possibility of a fourth (allegedly unlawful) search. The defendant did not seek exclusion of the evidence gained in the first search. Even if the alleged fourth search resulted in improperly obtained evidence from Mr Ngamoki, the low level of impropriety, the apparent police right to inspect his firearms, the lack of bad faith, and the public interest all would tend to suggest the evidence is admissible under s30.

Was the DPMS rifle proven to be an MSSA firearm?

[58] Evidence the DPMS rifle was an MSSA comes from Robert Ngamoki, with opinions expressed by others not presented as experts. Mr Wainwright sent Mr Ngamoki the DPMS rifle with no magazine attached. He later sent a bag of large magazines, one of which could be fitted to the DPMS rifle. An MSSA firearm is a semi-automatic firearm which has one or more of the defined features. The police say the DPMS rifle was an MSSA because it had a magazine capable of holding more than seven cartridges and also because it had a pistol grip.

[59] The experts differed about whether it had a pistol grip, but the police must prove beyond reasonable doubt that this DPMS rifle did. Both experts agreed the DPMS rifle grip was connected to the balance of the firearm by means of two screws. Both agreed that there was one point of interface between the grip and the balance of the firearm. Mr Woods however said each screw provided a separate structural connection, and *"in engineering points are absolute specific points, pinpoints, and that grip was clearly structurally attached at two points about 15 millimetres apart"* (p 117 NOE). This reference to structural attachment points as having specialist meaning in engineering terms arose in re-examination only and did not again arise.

[60] The Arms (Military Style Semi-Automatic firearms – Pistol Grips) Order

2013 (the Order) defines a freestanding pistol grip for the purposes of defining an MSSA firearm. A grip is *the component of the firearm....designed to be gripped by the trigger hand of a person while the person is firing the firearm.* A freestanding grip is one which has all of four defined attributes. The challenge was to one only of those four attributes: whether the grip on the DPMS rifle was *structurally connected to the firearm at only one point.* What then is the meaning of *structurally connected at only one point,* and is the DPMS rifle proven beyond reasonable doubt to have a freestanding pistol grip?

[61] In interpreting that term, I must consider why that definition was adopted (said to be to promote a clearer definition of an MSSA). I accept Parliament intended to promote safe use and control of firearms, and to recognise the greater capacity for MSSAs to cause wider and more serious harm, as noted in the quotations from Hansard and the Law and Order Committee meeting of 8 August 2011. I ought to adopt a generous approach to the wording in light of the intention and purpose, but I cannot create amendments to the Order.

[62] Is the addition of an "after market" additional screw, so that the grip on the DPMS rifle was unable to be disconnected without undoing both screws, sufficient to put this grip outside the definition? Has the prosecution proven beyond reasonable doubt this grip was structurally connected at only one point to the balance of the firearm? Mr Woods' evidence was not disputed that each of the screws separately attached the grip to the balance of the firearm (p 114 and 115 NOE), meaning the grip was structurally attached at two points about 15 millimetres apart (pp 117 NOE). He ascribed a specialist meaning to *structural attachment at only one point.* Mr Ngamoki said he was expecting this issue to come up at some stage (pp 95 and 96 NOE) but in his view it was a freestanding pistol grip because the entire grip is attached at one point. He said the defining aspect is the shape of the grip not the method of its attachment (p94 NOE), but he did not address whether the term *structural attachment at only one point* carries specialist meaning. Mr Woods' evidence is unchallenged on this particular point, and I have no evidence to allow me to say it is wrong. I cannot then exclude the reasonable possibility it does have a specialist engineering meaning. If satisfied that were not the case, I would accept Mr Ngamoki's approach, on the basis that the DPMS rifle had a grip designed to be

held in the trigger hand of the person firing the firearm, and *structurally connected at only one point* must be interpreted in that sense. However for the present purposes, in light of Mr Woods's evidence, I cannot find it proven whether beyond reasonable doubt, or even on balance of probabilities, that the grip on this DPMS rifle was structurally connected at one point only to the balance of the firearm, when it was connected, securely, by each of two screws. The evidence is evenly balanced, with the result that this DPMS rifle may be an MSSA because of its pistol grip, and it may not. This is plainly an unsatisfactory outcome, but is the only one available to me in light of the evidence.

[63] Was the DPMS rifle nevertheless an MSSA because it was a semi-automatic "having a magazine" fitting the description of one of four possibilities. I find as a fact that when police found and seized the DPMS rifle it was fitted with a magazine capable of holding five cartridges. There is no evidence it has ever held a larger magazine (except when the police had it). Although it was found with larger magazines nearby (on a shelf within the same safe) it was also found with other 'firearms' (for which there are no charges).

[64] Police refer to *Police v Bruce* (CRN 5085022673 30 May 1996) and *Police v Muench* [1997] DCR 1016. In each the District Court accepted that finding a large magazine near a firearm (not otherwise an MSSA) was sufficient to convert it into one. But those are each decisions on the facts of those cases. In *Bruce* there was apparently only one firearm. I am also referred to *Perez v Queen* [2015] NZCA 267, which is binding authority. The Court of Appeal specifically approved the trial Judge's question trail as a 'model of its kind' and containing 'no error' (paras [44] and [45]). The question trail contained this: *So long as you are satisfied that the magazine inspected with the Bushmaster was for use in the Bushmaster you need not be satisfied that it was attached to it.* (see para [32]). Therefore the prosecution must prove beyond reasonable doubt that a particular magazine converts a particular firearm into an MSSA, and that is a question of fact in each case.

[65] The DPMS rifle was not apparently capable of holding more than one magazine at a time. It was fitted with a small magazine and there is no evidence it has ever been fitted with a larger one (except by police). I understand anyone can

possess magazines; an offence occurs if the person has no E category endorsement and either keeps a semi-automatic firearm with a larger magazine attached, or keeps a large magazine for use with a semi-automatic firearm. If there is no direct evidence the person has fitted the larger magazine for use in the semi-automatic firearm, then, should the evidence permit, the Court can infer such an intention. But proof beyond reasonable doubt is required. I am not satisfied that, by storing larger magazines and other firearms in the same gun safe with the DPMS rifle, when it was already fitted with a magazine with a 5 cartridge capacity, it is proven beyond reasonable doubt that Mr Lincoln had converted that DPMS rifle into an MSSA. I am unable to find it proven beyond reasonable doubt the DPMS rifle is an MSSA on the grounds of the size of the magazine which it was found to be 'having', as the section requires.

Was the Hatsan shotgun proven to be an MSSA firearm?

[66] The Hatsan shotgun was said to be an MSSA because it had a magazine capable of holding 8 rounds. Mr Ngamoki said this was a semi-automatic firearm capable of holding more than seven rounds, and was therefore an MSSA firearm. Having loaded eight rounds into that firearm, Mr Ngamoki damaged the firearm when he discharged the seventh. Technically he was able to squeeze eight 2 ¾ inch cartridges into the magazine (see p 116 NOE), but he was unable to fire more than six. He said he believed it was because the seventh was defective, but as neither that cartridge nor the damaged trigger mechanism was available in Court, that belief is incapable of being tested (and the defence expert could not consider it). That affects any weight attaching to that belief.

[67] Police submit that as the manufacturer has imprinted on the Hatsan shotgun that it can be loaded with 2 ¾ inch cartridges, and Mr Ngamoki was able to squeeze eight such into it, then it qualifies as an MSSA. Mr Woods accepted that the magazine was "just" capable of being fitted with eight 2 ¾ inch cartridges, but said the usual size for that firearm was three inch cartridges, which lead to cleaner kills in bird shooting. He also said 2 ¾ inch was the nominal length of the fired case, not the actual length of the cartridge. Small variations in the lengths of the various brands of cartridges can create an *inadvertent eight shot magazine* capacity. All magazines are designed to have free space to avoid over-compressing the spring which can lead

to permanent damage. More than seven 3 inch cartridges could not be fitted into the magazine of the Hatsan shotgun (p109 NOE). A licensed firearms owner could on Mr Ngamoki's evidence be unwittingly in possession of an MSSA, even though he purchased and consistently loaded that firearm with not more than seven cartridges, and the magazine would or could have been damaged if he fired it when it contained eight.

[68] The Hatsan shotgun is not now able to discharge a shot. It is clearly established that before Mr Ngamoki damaged it, it was able to discharge six rounds in succession. Mr Ngamoki believes he had loaded a defective seventh cartridge, but I cannot exclude the reasonable possibility that the magazine of that firearm was not in fact capable of holding for safe discharge more than seven, and that by using the free space designed to avoid over-compression, Mr Ngamoki had stretched that magazine beyond its capacity to function properly. The term 'capable of holding' must mean holding for the purposes of discharging a shot. Mr Ngamoki did not dispute that, loaded with rounds of a larger size, the magazine would not hold eight, but loaded with small rounds (which apparently compromised the firearm on the only known occasion when that occurred) he said it would be. Anyone can make cartridges of any length, and even commercially made cartridges vary in size. The Hatsan shotgun then has a magazine into which Mr Ngamoki was able to squeeze, but not discharge, eight cartridges. I therefore cannot find it is proven beyond reasonable doubt that the Hatsan shotgun had, at the time it was seized, a magazine capacity which qualified it as an MSSA firearm. Proof that it was more probable than not, or even proof that it was highly likely would not suffice.

[69] If I had found this Hatsan shotgun (and all others like it) was an MSSA, the evidence suggests many owners of similar firearms will be unwittingly outside their licence, without ever having loaded the firearm with more than seven cartridges (pp 109 and 110 NOE). Both experts accepted such firearms are commonly sold as not requiring E category endorsement, a matter of which police must be aware. Plainly some legislative clarification would assist.

Was Mr Lincoln proven beyond reasonable doubt to be in possession of either or both firearms in question?

[70] Both counsel refer to the need for proof that Mr Lincoln knew that the DPMS rifle and the Hatsan shotgun possessed qualities which made them MSSA firearms (if they did) before he can be found to have been in possession of MSSAs. I accept it is established Mr Lincoln is a very knowledgeable firearms owner, and, as he had shown at Dunsandel, and again in Ashburton, and as he already held an E category endorsement, he knew what would convert any semi-automatic firearm into an MSSA firearm. If called upon to do so, and assuming there was admissible evidence of finding the firearms in Mr Lincoln's control, I would be satisfied on the evidence that Mr Lincoln had sufficient knowledge for possession.

Was Mr Lincoln's alleged possession unlawful?

[71] Does the evidence show Mr Lincoln had discharged any onus upon him? I would conclude on balance of probabilities that the evidence here shows Mr Lincoln had an E category endorsement on his licence, permitting him to have MSSAs.

[72] An E category endorsement is one granted under s30B Arms Act. Under s.30A any person aged 18 or over, who is the applicant or holder of a firearms licence, may apply to the police for an endorsement permitting him/her to possess a military style semi-automatic firearm. The application must be on a form provided by the police. There is nothing in the wording of s30A which requires a separate application for each MSSA, and nothing to suggest the form is regulated or fixed by Order in Council. Section 30B provides:

> On receiving an application under section 30A, a member of the Police may, subject to any direction from the Commissioner, make the endorsement applied for, if that member is satisfied that the applicant is a fit and proper person to be in possession of the military style semi-automatic firearm to which that application relates.

That wording suggests, but equivocally, that a separate endorsement is required for each MSSA firearm.

[73] The endorsement, if granted, then permits possession of the MSSA to which that application relates. Although *the military style semi-automatic firearm to which that application relates* is expressed in the singular, under the Interpretation Act 1999 words in the singular include the plural and words in the plural include the singular (s 33 Interpretation Act 1999). Therefore s 30A and s 30B Arms Act do not appear to require a separate application for an endorsement for each and every MSSA firearm a person owns. I was told nothing of police practice in relation to this. Neither did police produce evidence of Mr Lincoln's applications for licence or E category endorsement. I have not seen the actual licence and endorsement or endorsements granted to him and have only Mr Wainwright's summary of what he saw as important about those documents. I can only deal with the evidence I am given. I must accept then that an endorsement may be sought and (apparently) granted for more than one MSSA. The same reasoning must apply to s 50.

[74] Mr Wainwright's evidence as to the conditions attaching to Mr Lincoln's E endorsement (p 226 NOE) refer to 'firearms storage' (with no apostrophe, and therefore plural, in NOE, and without later clarification) and it was Mr Lincoln's obligation to allow police to inspect the storage, notify police within 24 hours of taking possession of an MSSA, and to allow an arms officer to 'inspect any MSSA'. As I was not presented with the licence, endorsement and terms in any other way than as described by Mr Wainwright, I must assume, based on what he said, that Mr Lincoln's licence and endorsement permitted him to have more than one MSSA firearm. It must then follow that Mr Lincoln can point to Mr Wainwright's evidence as available for proof on balance of probabilities that he was licensed with endorsement under s 30B for MSSA firearms in his possession (if there ever were any).

Summary

[75] In summary then:

- The charge of obstruction is not proven beyond reasonable doubt;
- The charge of possession of cannabis attracts no case to answer because

- it depended upon inadmissible evidence obtained by unlawful search
- the evidence did not address whether the plant material met the definition of cannabis;

and in any event the evidence did not prove possession of cannabis by Mr Lincoln beyond reasonable doubt;

- The charge of unlawful possession of the DPMS rifle attracts no case to answer because it depended upon improperly obtained and inadmissible evidence; in any event the DPMS rifle was not proven beyond reasonable doubt to be an MSSA; also I would be satisfied on balance of probabilities Mr Lincoln had an E category endorsement allowing him to possess such firearms (if he did);

- The charge of unlawful possession of the Hatsan shotgun attracts no case to answer because it depended upon improperly obtained and inadmissible evidence; in any event the Hatsan shotgun was not proven beyond reasonable doubt to be an MSSA; also I would be satisfied on balance of probabilities Mr Lincoln had an E category endorsement allowing him to possess such firearms (if he did).

J E Maze
District Court Judge

Signed in Timaru on 14th July 2017 at 11.15 am/~~pm~~

Reserved decision delivered by me pursuant to section 106(5) of the Criminal Procedure Act 2011.

Pip O'Connell
Deputy Registrar
12.05 pm 14 July 2017