NOTE: PUBLICATION SUBJECT TO HIGH COURT SUPPRESSION ORDERS

IN THE SUPREME COURT OF NEW ZEALAND

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[2011] NZSC 27

OMAR HAMED
TAME WAIRERE ITI
PHILLIP PUREWA
MARAKI TEEPA
EMILY FELICITY BAILEY
TRUDI PARAHA
TE RANGIWHIRIA KEMARA
TUHOE LAMBERT
RAWIRI KIYOMI ITI
URS PETER SIGNER
RAUNATIRI HUNT
VALERIE MORSE

v

THE QUEEN

Hearing: 21 March 2011

Court: Elias CJ, Blanchard, Tipping and McGrath JJ

Counsel: R E Harrison QC and T B Afeaki for Applicants
J C Pike and N P Chisnall for Respondent

Judgment: 24 March 2011

JUDGMENT OF THE COURT

A The application for leave to appeal is granted.

B The approved grounds are whether the challenged evidence was lawfully obtained under s 198 of the Summary Proceedings Act 1957 or was, alternatively, properly admissible pursuant to s 30 of the Evidence Act 2006.

C The appeal is set down for hearing on 3 and 4 May 2011.

REASONS

(Given by Elias CJ)

[1] The applicants, all represented for the purposes of the leave hearing by Mr Harrison QC, sought leave to appeal a decision of the Court of Appeal[1] ruling that evidence obtained by surveillance and physical search is admissible at the trial of the applicants, currently scheduled for twelve weeks starting on 30 May 2011. The Court of Appeal, differing from the conclusion reached in the High Court by Winkelmann J,[2] held that most of the evidence was lawfully obtained pursuant to warrants issued under s 198 of the Summary Proceedings Act 1957. (Some surveillance evidence was held by the Court to be improperly obtained by trespass, but it held such evidence was admissible under s 30 of the Evidence Act 2006.) In respect of the evidence it held to have been lawfully obtained under s 198 warrants, the Court of Appeal indicated that, if wrong in the conclusion of lawfulness, it would have nonetheless held the evidence admissible under s 30 of the Evidence Act (on the basis that its exclusion would be disproportionate to the impropriety). In this indication, the Court of Appeal agreed with the conclusion reached by Winkelmann J.[3]

[2] Both the validity of the surveillance and searches under s 198 of the Summary Proceedings Act and the assessment of disproportionality in the exclusion of the evidence, should the searches be unlawful or in breach of s 21 of the New

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1 *Hunt v The Queen* [2010] NZCA 528.
2 *R v Bailey* HC Auckland CRI-2007-085-7842, 7 October 2009.
3 *R v Bailey* HC Auckland CRI-2007-085-7842, 15 December 2009.

Zealand Bill of Rights Act 1990, raise matters of general or public importance (as is conceded by the Crown) which make it necessary in the interests of justice for this Court to consider the correctness of the approach taken in the Court of Appeal. The only point that has exercised the Court in granting leave is the application of s 13(4) of the Supreme Court Act 2003:

> (4) The Supreme Court must not give leave to appeal to it against an order made by the Court of Appeal on an interlocutory application unless satisfied that it is necessary in the interests of justice for the Supreme Court to hear and determine the proposed appeal before the proceeding concerned is concluded.

[3] The appeal arises out of an order made under s 344A of the Crimes Act 1961. Under the general heading "Evidence" it provides:

> **344A Interlocutory order relating to admissibility of evidence**
>
> (1) Where any person is committed for trial and –
>
> (a) The prosecutor or the accused wishes to adduce any particular evidence at the trial; and
>
> (b) He believes that the admissibility of that evidence may be challenged, -
>
> He may at any time before the trial apply to a Judge of the court by or before which the indictment is to be tried for an order to the effect that the evidence is admissible.

[4] Under s 344A(4), no order made under s 344A affects the right of the prosecutor or the accused to seek to adduce evidence he claims to be admissible during the trial. The trial judge continues to have a discretion to allow or exclude any evidence "in accordance with any rule of law", notwithstanding a pre-trial determination that it is admissible or inadmissible, in order to meet the circumstances at trial. Such reservation of responsibility to the trial judge is of particular importance where admissibility turns on contextual judgment. It may have less scope where admissibility turns in part on the interpretation of a statutory provision. In the present case, the Court of Appeal's conclusion that the surveillance and searches which resulted in the evidence were authorised by warrant under s 198 of the Summary Proceedings Act would prevent reconsideration of the admissibility of the evidence by the trial judge.

Section 13(4) of the Supreme Court Act controls appeals to the Supreme Court from s 344A determinations

[5] The proposed appeal to the Supreme Court is provided for by s 379AB of the Crimes Act which was inserted on 26 June 2008 by s 8 of the Crimes Amendment Act (No 2) 2008. It permits appeals, with the leave of the Supreme Court, by either the Solicitor-General or an accused from decisions of the Court of Appeal on appeal from a determination of the trial Court as to admissibility under s 344A. The first appeal to the Court of Appeal before trial itself requires leave of the Court of Appeal,[4] an indication that such appeals pre-trial are not in the normal course.[5] Although s 344A appeals reach the Supreme Court only with its leave under s 379AB (or s 379A(1)(aa) in the case of direct appeals), s 12 of the Supreme Court Act 2003 makes it clear that ss 13 and 14 of the Supreme Court Act apply in addition:

> **12 Appeals to be by leave**
>
> (1) Appeals to the Supreme Court can be heard only with the Court's leave.
>
> (2) References in enactments other than this Act to the leave of the Supreme Court must be read subject to sections 13 and 14.

The effect of s 12(2) is that the Supreme Court is not permitted to grant leave to appeal "an interlocutory application" unless it is satisfied that "it is necessary in the interests of justice for the Supreme Court to hear and determine the proposed appeal before the proceeding concerned is concluded", in application of s 13(4).

[6] "Interlocutory" (the term used of "orders" on application under s 344A of the Crimes Act and of "applications" under s 13(4) of the Supreme Court Act) is defined for the purposes of the Supreme Court Act in s 4:

> **interlocutory application-**
>
> (a) means an application in a proceeding or intended proceeding for –

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4 Or the leave of the Supreme Court in the case of a direct appeal under s 379A of the Crimes Act 1961.

5 Since appeal after conviction, which may challenge the admissibility of evidence as wrong in law, is available to an accused by right: see Crimes Act 1961, s 383(1).

(i) an order or a direction relating to a matter of procedure; or

(ii) in the case of a civil proceeding, for some relief ancillary to the relief claimed in the pleading; and

(b) includes an application for a new trial; and

(c) includes an application to review a decision made on an interlocutory application

[7] Mr Harrison argued that a s 344A application is not an "interlocutory application" for the purposes of s 13(4) of the Supreme Court Act and that the additional filter for leave imposed by that provision therefore did not apply to the present application. In those circumstances, he maintained that leave should be granted when the s 13(2) criterion of general or public importance is fulfilled (as is here accepted to be the case). This interpretation would turn the prohibition in s 13(1) (that "[t]he Supreme Court must not give leave to appeal to it unless it is satisfied that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal") into a requirement to give leave where the s 13(2) criteria are made out (subject only to a narrow residual discretion to decline leave, conceded by Mr Harrison). Two arguments in support of this contention were put forward. We consider they can be rejected shortly.

[8] First, it was somewhat faintly suggested that s 13(4) is confined to appeals from orders of the Court of Appeal made on interlocutory application to that Court in connection with appeals to it. This interpretation is inconsistent both with the definition in the Supreme Court Act of an "interlocutory application" and the terms of s 13(4) itself. Applications are made "in a proceeding or intended proceeding" rather than in an appeal. The definition makes it clear that an application for new trial is an interlocutory application and applications for relief "ancillary to the relief claimed in the pleading" are similarly interlocutory applications. Both are substantive applications made to the trial court. The inclusion of a "review [of] a decision made on an interlocutory application" is consistent with the interlocutory order being that made in the trial court (where the order of an Associate Judge or a District Court Judge may be the subject of review in the High Court). The reference in s 13(4) to the necessity to hear and determine the proposed appeal from the Court of Appeal on an interlocutory application "before the proceeding concerned is

concluded" is consistent only with the interlocutory application being the application to the trial court leading to the order which is the subject of appeal to the Court of Appeal, rather than an interlocutory order made by the Court of Appeal in the appeal, although the latter would also be covered.

[9] Secondly, it was argued that the definition refers to "an order or a direction relating to a matter of procedure", and that a ruling on the admissibility of evidence is not properly treated as a matter of procedure. We are of the view that a technical distinction between evidence and procedure was not intended in the provision for appeals pre-trial. The interpretation of "procedure" to include preliminary rulings on evidence is consistent with the purpose of s 13 in ensuring that such appeals can be entertained where the interests of justice require that they be heard and determined before the proceedings are concluded. In some cases (for example, where the Solicitor-General seeks to appeal a ruling or there is particular risk of prejudice if the trial proceeds on the basis of orders made in the trial Court or on appeal to the Court of Appeal) appeal after trial may not be an option or may not be adequate to serve the interests of justice. It is consistent with the rights of appeal provided with leave under the Crimes Act for rulings under s 344A (and also consistent with general understanding of what is "procedural") that the reference in s 13(4) to interlocutory appeals is interpreted to include orders made on pre-trial applications determining the admissibility of evidence. The calling of evidence is part of the process or procedure of the trial in this context.

[10] We therefore do not accept the first submission raised by Mr Harrison, that the Supreme Court must grant leave for appeals on interlocutory applications whenever a point of general or public importance is raised. First, the prohibition against leave in s 13(1) cannot be turned on its head to erode the discretion conferred by s 12(1). The Court cannot grant leave to appeal unless it is satisfied the s 13 criteria are made out, but it is not obliged to grant leave when so satisfied. We consider that Parliament intended a wider discretion on whether to take cases than is suggested by the argument for the applicants, as is consistent with the function of a final court of appeal. The interpretation suggested is not only contrary to the expression of s 13(1); it would also leave s 13(4) and the restriction it imposes very little scope. And it would undermine the standardisation imposed by s 12(2) of the

Supreme Court Act where leave of the Supreme Court is referred to in other enactments, which suggests a policy of achieving consistency in the treatment of appeals. It would make no sense to leave out of the sieve provided for pre-trial appeals to the Supreme Court by s 13(4) the larger part of the volume of appeals which arise from s 344A determinations. If Parliament in enacting the amendment in 2008 had intended such a restriction, it would surely have said so directly.

[11] Section 13(4) is a controlling provision where appeals are brought from decisions on interlocutory applications, including those made to determine the admissibility of evidence ahead of trial under s 344A . It is accordingly competent to grant leave in such cases only where this Court is satisfied that it is "necessary in the interests of justice" to determine the proposed appeal "before the proceeding concerned is concluded".

The application of s 13(4) to the proposed appeal

[12] In most cases where an arguable point of general or public importance arises on an interlocutory application, it will not be "necessary in the interests of justice" to hear the proposed appeal before the proceeding in which the order is made is concluded if the appeal point is open to be taken after the proceedings are concluded. That will usually be the case where evidential rulings are made against the accused in pre-trial rulings in criminal cases. In such cases, as has already been mentioned, s 344A(4) makes it clear that first instance rulings are provisional and may be reconsidered by the trial judge.

[13] The requirement that entertaining an appeal before the proceeding is concluded is "necessary in the interests of justice" sets a significant threshold. In s 13(4) those words are to be given their ordinary meaning, rather than the meaning defined by s 13(2) for the purposes of general leave. The threshold may more readily be passed where correction by appeal following conclusion of the hearing is not available. The statutory stricture is also consistent with the proper reluctance of final courts of appeal to supplant the responsibility of the intermediate court of appeal in supervising trial practice, a responsibility that must be exercised with some expedition. In the case of the s 344A jurisdiction, the provisional basis of such

rulings, which may be overtaken by re-assessment in the context of trial, prompts appellate caution pre-trial. There is risk in coming to conclusions dependent on a factual assessment without the advantage of trial context. The consequences of inadequate context are amplified in the case of a court of final appeal.

[14] Despite the high threshold and the proper reluctance of the court to grant leave in cases where a s 344A ruling may be able to be re-visited at trial and will be able to be appealed post-conviction by the accused, we think that this case is one in which the jurisdiction to grant leave should properly be exercised. We consider it is necessary in the interests of justice for the Court to consider the appeal ahead of trial. The principal reason for that view is the conclusion of the Court of Appeal, overturning on the point the decision of the High Court, that the surveillance evidence was obtained lawfully under warrants issued under s 198 of the Summary Proceedings Act. The conclusion was reached as a matter of statutory interpretation and is therefore binding on the trial judge so that, if it stands, there is no opportunity for the trial judge to re-visit the question of admissibility, such as might otherwise be done under s 30 of the Evidence Act, should the provisional conclusion that exclusion would be disproportionate require reconsideration on the evidence actually adduced and in the context of the trial. The Court of Appeal's interpretation of s 198 also concerns an important issue in the investigation of suspected crime which should be resolved promptly.

[15] Although the Court of Appeal indicated its view, in application of s 30 of the Evidence Act, that all the evidence should be admitted even if unlawfully obtained or obtained in breach of s 21 of the New Zealand Bill of Rights Act, we have some doubts as to whether it was in a position to express a view on the proportionality of exclusion. An assessment of this kind requires the gravity of the infringement to be carefully balanced against the benefits of admission of the evidence. Since the Court of Appeal took the view that there was no infringement, it was an unnecessary and perhaps artificial exercise for it to undertake the s 30 assessment in respect of the evidence it considered to have been lawfully obtained under s 198 warrants.

[16] Mr Pike, for the Crown, acknowledged that central to the conclusions of the High Court and the Court of Appeal that the surveillance evidence should be

admitted under s 30 of the Evidence Act was the view that the alleged conduct of the accused was so serious that the police had no alternative but to undertake covert surveillance. As he fairly acknowledged, this impression might either be strengthened or undermined by the context available at trial. But, if the Court of Appeal view that s 198 permitted such surveillance prevails, the judge in the best position to make the primary assessment of proportionality in application of s 30 will not be called upon to do so. If this Court eventually was to hold, after trial and convictions, that the interpretation of s 198 adopted by the Court of Appeal was wrong, the trial would not have provided opportunity for re-assessment of the provisional view as to admissibility under s 30 of the Evidence Act. And this Court may have to make the assessment on the basis of what transpired at the trial, which may be on a different basis from that on which the matter was considered in the judgments under appeal.

[17] Although not perhaps determinative on their own, other factors too pull in the direction of hearing the appeal before trial. The Crown accepts that, in the absence of the surveillance and search evidence, the Crown case is in difficulties. The trial is expected to take twelve weeks. Eighteen accused are on trial. The decision of the Court of Appeal on the interpretation of s 198 broke new ground. It was contrary to the view taken by the High Court Judge. It is also contrary to the understanding expressed by the Law Commission of the scope of s 198 of the Summary Proceedings Act when recommending that the police be provided with specific surveillance powers.[6] It is clearly a matter of general and public importance that the correctness of the Court of Appeal's interpretation of s 198 be reviewed promptly by this Court. There is also public interest in avoiding unnecessary expense and delay, should this Court ultimately and post-trial come to a different conclusion from the Court of Appeal. The underlying matter is one of considerable public moment. The challenges to the evidence are central to the prosecution case and may prove decisive.

[18] In these unusual circumstances, we consider it is necessary in the interests of justice to entertain the appeal before the hearing in the High Court is concluded. Although our reasons are principally concerned with the interpretation of s 198, if

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6 Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at 118–119.

leave is to be granted it is artificial not to grant it also on the s 30 determination (the sole basis of admission in the High Court and the fallback position in the Court of Appeal), even though, in terms of s 344A(4), such a conclusion in favour of admissibility would be provisional.

[19] Counsel have accepted that an early hearing of the appeal must be expedited. The appeal, on the grounds appearing in the judgment of the Court, will be heard on 3 and 4 May 2011.

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