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IN THE SUPREME COURT OF NEW ZEALAND

SC 74/2013
[2013] NZSC 83

BETWEEN	WAATA ROBERT JOHN HENRY CHAPMAN Applicant
AND	THE QUEEN Respondent

Court:	Elias CJ, William Young and Arnold JJ
Counsel	A J Bailey for the Applicant P D Marshall for the Respondent
Judgment:	23 August 2013

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant is to stand trial next week on charges of blackmail and assault. He seeks leave to appeal from a pre-trial ruling of Whata J upholding the admissibility of phone data (including the content of text communications) for the period from 19 to 26 October 2012. This was obtained by the police pursuant to a production order made on 2 November 2012. The applicant contends that the text communications were unlawfully intercepted by his telecommunications service provider. The case primarily turns of the interpretation and application of s 216B of the Crimes Act 1961.

[2] To obtain leave, the applicant must satisfy us that there are exceptional circumstances which justify an appeal direct from the High Court.[1] As well, because the subject matter of the proposed appeal is a judgment given on an interlocutory application, s 13(4) is also relevant.[2]

[3] In a number of judgments the Court of Appeal has construed s 216B of the Crimes Act in a way which is unfavourable to the applicant's argument.[3] The applicant wishes to appeal direct to this Court because he considers that the Court of Appeal would see his argument as precluded by its earlier judgments. It is correct that in at least two of the judgments in question,[4] the Court of Appeal addressed whether the telecommunication service providers' recording and storage practices in issue amounted to interception. And it may be correct that the Court of Appeal would conclude that the reasoning in those cases would preclude acceptance of the applicant's argument. But irrespective of whether this is so – and we have not reached a view on this point – it would be wrong to grant leave to appeal.

[4] The factual circumstances in the present case differ from those under consideration in the earlier cases. The police procedures in those cases (involving "pre-loading") and the practices of the telecommunication service providers as to the recording and particularly the storage of phone data differ from those now current. As well, those cases were decided in the context of legislation which preceded the Search and Surveillance Act 2012. This means that it would not be right for this Court to address the issues raised by the applicant without them having first been reviewed in light of contemporary practice by the Court of Appeal.

[5] There is no risk of substantial prejudice to the applicant because his admissibility arguments will be available to him on appeal should he be found guilty of any of the charges he faces.

Solicitors:
Crown Law for the Respondent

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1 Supreme Court Act 2003, s 14.

2 Counsel for the applicant correctly pointed out that the proposed appeal is not from the Court of Appeal with the result that s 13(4) does not apply. But the policy underpinning s 13(4) is nonetheless relevant to the exercise of the evaluative exercise required by s 14.

3 *R v Cox* (2004) 21 CRNZ 1 (CA); *R v Taui* [2007] NZCA 233; and *R v Javid* [2007] NZCA 232. There were some changes to the legislation between *Cox* and the other two cases.

4 *Cox*, above n 3, and *Taui*, above n 3.