ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 68/2019
[2019] NZSC 88

BETWEEN	JENNIFER ELAINENA CASTLES Applicant
AND	THE QUEEN Respondent

SC 69/2019

BETWEEN	MACFARLANE DEAN TOPIA Applicant
AND	THE QUEEN Respondent

Court:	Winkelmann CJ, O'Regan and Ellen France JJ
Counsel:	G A Walsh for Applicant SC 68/2019 C D Bean for Applicant SC 69/2019 R K Thomson for Respondent
Judgment:	16 August 2019

JUDGMENT OF THE COURT

A The application for leave to bring a pre-trial appeal is dismissed.

B We make an order prohibiting publication of the judgment and any part of the proceeding (including the result) in the news media or on the internet or on any other publicly available database until final disposition of the trial. Publication in a law report or law digest is permitted.

REASONS

[1] The applicants seek leave to appeal against a decision of the Court of Appeal[1] upholding a pre-trial ruling of the District Court declaring that evidence obtained from a search of their residence was admissible at their trial for serious drug offending.[2]

[2] The application for a search warrant of the applicants' residence was made by a police officer who was not a "constable" as defined in s 4 of the Policing Act 2008 because he had not, at the relevant time, taken the constable's oath as required under s 22 of the Policing Act.[3] The fact that the application for a search warrant was made by a police employee who was not a constable rendered the search warrant issued invalid. This is because s 6 of the Search and Surveillance Act 2012 provides that a search warrant may be issued "on application by a constable". The term "constable" is defined in s 3 the Search and Surveillance Act by reference to the definition in the Policing Act.

[3] It has been accepted by the respondent throughout the proceeding that the search warrant was invalid because of this oversight on the part of the police. The fact that the police officer was not a constable is the only defect alleged in relation to the warrant and there is no complaint about the manner in which the search was undertaken pursuant to what the police believed was a valid warrant.

[4] In both the District Court and the Court of Appeal, the applicants argued that the invalidity of the search warrant rendered the evidence inadmissible, and that s 30

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1 *Topia v R* [2019] NZCA 263 (Kós P, Miller and Brown JJ) [CA judgment].

2 *R v Castles* [2018] NZDC 25006 (Judge Menzies) [DC judgment].

3 The officer who signed the warrant application had been sworn in as a constable in 2007. He left the police in 2016 and returned in 2017. He did not realise that it was necessary that he take the constable's oath again, and thus at the time he made the application for the search warrant he was not a "constable" as defined.

of the Evidence Act 2006 could not be applied. This argument was based on the decision of this Court in *Birchler v Police*.[4]

[5] In *Birchler*, the police failed to comply with s 69(1) of the Land Transport Act 1998 meaning that a precondition for requiring a person to accompany a police officer in order to undergo an evidential breath test had not been met. Section 64(2) of the Land Transport Act provides that it is no defence to an excess breath alcohol charge that the procedures set out in ss 68 to 75A and 77 of the Land Transport Act have not been met if there had been a reasonable compliance with those provisions.

[6] This Court noted that since s 64(2) provides for a limited dispensation from the specific requirements of the Land Transport Act, it would be inconsistent with the statutory scheme if, notwithstanding a lack of reasonable compliance (and therefore the existence of a defence), the Court could nevertheless apply s 30 of the Evidence Act to admit the evidence obtained under the unlawfully conducted evidential breath test or blood test.[5]

[7] The argument that *Birchler* applied in the present case was rejected by both the District Court and the Court of Appeal.[6]

[8] The applicants seek to raise the same argument as they made in the Courts below to the effect that *Birchler* applies in the present situation. Having reviewed the reasons given for rejecting the argument in the Courts below, we consider that such an argument would have insufficient prospect of success to justify a further appeal.

[9] The applicants also seek to argue, as a backstop, that the Courts below were wrong to rule under s 30 of the Evidence Act that the evidence obtained from the search of their residence was admissible despite the invalidity of the search warrant. We see the application of s 30 in the Courts below as an orthodox application of the requirements of that section, giving rise to no point of public importance and no

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4 *Birchler v Police* [2010] NZSC 109, [2011] 1 NZLR 169.
5 At [17].
6 DC judgment, above n 2, at [12]; and CA judgment, above n 1, at [9].

appearance of a miscarriage of justice. We do not consider that the statutory basis for the grant of leave to appeal on this point is therefore made out.[7]

[10] We therefore dismiss the applications for leave to appeal.

[11] For fair trial reasons, we make an order prohibiting publication of the judgment and any part of the proceeding (including the result) in the news media or on the internet or on any other publicly available database until final disposition of the trial. Publication in a law report or law digest is permitted.

Solicitors:
Crown Law Office, Wellington for Respondent

[7] Senior Courts Act 2016, s 74. Given this is a pre-trial appeal, this Court would also have to be satisfied that it is necessary in the interests of justice hear and determine the proposed appeal before the trial takes place: s 74(4).