IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 51/2023

MAHIA TAMIEFUNA
Appellant

v

THE KING
Respondent

APPELLANT SUBMISSIONS IN SUPPORT OF APPEAL AGAINST CONVICTION
Dated: 6 February 2024
For hearing: 6 March 2024

Counsel for the Appellant certify that, to the best of their knowledge, these submissions are suitable for publication and does not contain any information that is suppressed.

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MAY IT PLEASE THE COURT:

Introduction

1. The Appellant was convicted on one charge of aggravated robbery by Davison J in the Auckland High Court, following a Judge-alone trial commencing 30 July 2021. The critical evidence in this case was a photograph of Mr Tamiefuna taken by a police officer in the course of a routine traffic stop,[1] which was then submitted into the Police National Intelligence Application ("**NIA**").

2. On 10 February 2022, the Appellant appealed against his conviction in the Court of Appeal on the basis that the photograph was obtained in breach of his right to unreasonable search and seizure and should not have been admitted. The Permanent Court of Appeal released its decision on 9 May 2023,[2] finding that the taking of the photograph amounted to an unreasonable search for the purposes of s 21 of the New Zealand Bill of Rights Act 1990 ("**NZBORA**"), but that it was nonetheless correctly admitted under s 30 of the Evidence Act 2006 ("**Evidence Act**").

3. The Appellant appeals against the Court of Appeal's decision in ruling the evidence admissible.[3] In response, The Crown challenges the Court of Appeal's determination that the taking of the photograph amounted to an unreasonable search.

4. This Court has granted leave to appeal on two questions:[4]

   (a) whether the Court of Appeal was correct to find that the photographic evidence was improperly obtained for the purpose of s 30 of the Evidence Act; and

   (b) whether the Court of Appeal was correct in admitting the evidence under s 30 of the Evidence Act.

5. The Appellant submits the answers to those questions should be "yes" and "no" respectively. Accordingly, the Appellant seeks for his conviction to be quashed.

Synopsis of submissions

6. In relation to the first issue on appeal, the Appellant submits the Court of Appeal was correct to find that the evidence was improperly obtained. The taking of the photograph amounted to a search because it invaded upon Mr Tamiefuna's reasonable expectation of privacy where he had not been suspected of any criminal offending. Furthermore, the search was unlawful as it did not comply

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[1] Photograph booklet: COA Exhibits p 42.
[2] *Tamiefuna v R* [2023] NZCA 163 [COA judgment]: SC Casebook [**SCCB**] p 9.
[3] Criminal Procedure Act 2012, ss 238(c) and 240.
[4] *Tamiefuna v* R [2023] NZSC 93 [**SC leave decision**] at [2]: SCCB p 7.

with the relevant provisions of the Policing Act 2008 or the Privacy Act 2020, which meant it was also unreasonable. In the circumstances, this meant the evidence was obtained in breach of the Appellant's right to unreasonable search and seizure under the NZBORA, rendering it improperly obtained for the purposes of s 30.

7. As to the second issue on appeal, the Appellant submits the Court of Appeal erred in its execution of the balancing exercise under s 30 of the Evidence Act, wrongly admitting the evidence. Insufficient weight was given to the importance of the right breached and the nature of the intrusion, whilst too much weight was placed on the seriousness of the offence and the nature and quality of the evidence. Further, the Court failed to take proper account of the need for an effective and credible system of justice in its balancing exercise. The Appellant has asked this Court for restatement and recalibration on the s 30 balancing test as a whole, due to the way it has been applied over the years resulting in improperly obtained evidence being admitted 80 per cent of the time.

Factual background

The offending

8. On the morning of 2 November 2019, the residential property at 19 Knox Road, Swanson was robbed by two men shortly after 6:00 am. CCTV footage at the property captured the two offenders arriving in a red Ford Falcon. A blue Ford Falcon also showed up at the same time, parking on the street outside the address.

9. The footage showed Manawanui Te Pou and an unidentified individual entering the complainant's property. Mr Te Pou was clearly identifiable from the CCTV footage. His co-offender however was wearing a black cap which obscured his face, meaning he could not be recognised from the footage. In addition to the cap, he could be seen wearing a dark t-shirt, black and white Asics trainers, beige trousers with cuffs and a grey glove on his right hand.

10. The two men entered the property via the driveway. They gained access to the victim's house through the kitchen window. Once inside, they woke the victim up and took items of value, including the keys to his white Hyundai Santa Fe. A short time later, the unidentified male was captured leaving the scene in the victim's Hyundai Santa Fe. Mr Te Pou decamped in the red Ford Falcon they originally arrived in. The blue Ford Falcon followed.

11. Due to subsequent events, the Crown case alleged that Mr Tamiefuna was the unidentified male in question.

Subsequent events

12. Later that same day of 2 November 2019, CCTV cameras at a nearby Z petrol station captured Mr Te Pou arriving in a black Honda Odyssey, together with a male wearing a sleeveless maroon vest, a black cap, a pair of black and white trainers, beige trousers with cuffs and a single grey glove on his right hand. The same blue Ford Falcon that was at the scene of the aggravated robbery was also present.

13. Three days after the robbery in the early morning hours, Detective Sergeant Bunting ("**DS Bunting**") pulled over a vehicle with three occupants inside for the purposes of conducting a routine license check under s 114 of the Land Transport Act 1998. Mr Tamiefuna was the front seat passenger.

14. Each occupant was asked to provide their name and personal details to police, which they complied with. The driver of the vehicle was driving on a suspended license and the car was subsequently impounded. The occupants of the car were asked to step out of the vehicle and arrange an alternative form of transport back to their respective homes.

15. As they were removing their belongings from the car and placing them on the sidewalk, DS Bunting took out his smartphone and took photographs of Mr Tamiefuna and his associates. He did not ask to take the photos nor advise them he was about to take the photos. The officer proceeded to upload these photographs to the NIA database as part of an intelligence noting.[5]

Significance of the photograph

16. The significance of the photograph was that it depicted Mr Tamiefuna in "very similar, if not identical"[6] clothes to that which the unidentified individual at the Knox Road robbery and the Z petrol station was wearing. As Moore J recognised in his pre-trial ruling on the issue, the implication of the photo was that it assisted in "pulling together three threads of evidence tending to prove that it was Mr Tamiefuna who was involved in the robbery."[7]

17. As such, the photograph became a critical piece of evidence to the Crown case. Mr Tamiefuna's trial essentially turned on its admissibility. The trial Judge, Davison J, concluded it was admissible.

First ground of appeal: s 21 NZBORA

18. Leave has been granted to appeal on the question of "whether the Court of Appeal was correct to find that the photographic evidence was improperly

[5] COA Evidence p 13 line 16.
[6] *Tamiefuna v R* [2021] NZCA 263 at [2](b)]: SCCB p 51.
[7] *R v Tamiefuna* [2020] NZHC 162 at [112]: COA Casebook [**COA CB**] p 60.

obtained for the purpose of s 30 of the Evidence Act".[8] The Appellant submits the Court of Appeal was correct to find that the photographic evidence was improperly obtained.

s 21 NZBORA – unreasonable search and seizure

19. Section 21 of the NZBORA protects against unreasonable search and seizure. It guarantees:[9]

> Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

20. Section 21 serves to protect the privacy interests of the individual against the powers of the state. It has the overarching aim of protecting privacy,[10] but "more fundamentally, it holds a constitutional balance between the State and citizen by preserving space for individual freedom and protection against unlawful arbitrary intrusion by State agents".[11]

21. The term "search" is not defined by the Search and Surveillance Act 2012 ("**SSA"**). Instead, its meaning is derived from case law. Prior to 2011, New Zealand case law presented conflicting tests for determining whether a "search" for the purposes of section 21 had occurred. In the leading judgment of *Hamed v R*,[12] the majority of the Supreme Court held that police activity will amount to a "search" for section 21 purposes if it invades a person's reasonable expectation of privacy in the circumstances.[13] In determining whether or not someone had a reasonable expectation of privacy, the inquiry involves both subjective and objective elements:[14]

> An expectation of privacy will not be reasonable unless, first, the person complaining of the breach of s 21 did subjectively have such an expectation at the time of the police activity and secondly, that expectation was one that society is prepared to recognise as reasonable.

22. This interpretation of "search" provided by Blanchard J has since been upheld and endorsed in subsequent cases in both the Court of Appeal and the Supreme Court.[15] The established position behind s 21 now involves a two-step process.[16]

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[8] SC leave decision at [2]: SCCB p 7.
[9] New Zealand Bill of Rights Act 1990, s 21.
[10] See *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 [***Hamed***], where all the Supreme Court Justices accepted to varying degrees that the underlying purpose of s 21 is the protection of privacy – see Blanchard J at [161]; Tipping J at [223]; McGrath J at [264]; and Gault J at [285].
[11] *Hamed* per Elias CJ at [10].
[12] *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.
[13] At [163] per Blanchard J, endorsing the test articulated by the Supreme Court of Canada in *R v Wise* [1992] 1 SCR 527 at 533. This test was favoured over Tipping J's suggestion at [222] of taking a broader interpretation as to what constitutes a search, allowing more of the analysis being done under the second criterion of unreasonableness.
[14] At [163] per Blanchard J.
[15] See for example *Lorigan v R* [2012] NZCA 264; *R v Alsford* [2017] NZSC 42; and *McIntyre v R* [2020] NZCA 503.
[16] *Hamed* at [162] per Blanchard J.

First, the Court must consider whether a search (or seizure) has occurred. This is because the "touchstone of the section is the protection of reasonable expectations of privacy".[17] At this step, the key question is whether the person held a reasonable expectation of privacy in the circumstances.

23. If a reasonable expectation of privacy has been infringed upon, then the next question is whether the search (or seizure) was reasonable. This involves consideration of "the values underlying the right and a balancing of the relevant values and public interests involved".[18] Whilst the concepts of lawfulness and reasonableness are distinct, the Court of Appeal in *R v Williams* stated that for the purposes of determining the admissibility of evidence, unlawful searches should generally be treated as unreasonable for the purposes of s 21.[19] Elias CJ in *Hamed* adopted a similar view, stating that an unlawful search should automatically be regarded as an unreasonable search and in breach of s 21.[20] Despite this, searches that are lawful may nevertheless be unreasonable having regard to the manner, time and place in which the search was conducted.[21]

24. Only an unreasonable search or seizure will constitute a breach of s 21 NZBORA. Evidence that has been obtained as a result of an unreasonable search is improperly obtained evidence.[22] The s 30 balancing test is engaged only after this finding.

Taking of the photograph amounted to a search

25. In determining whether a s 21 breach has occurred, the first question is whether a search has taken place. In accordance with the test formulated by Blanchard J in *Hamed*, the key issue is whether there has been an invasion into the reasonable expectation of privacy of the individual.[23]

26. The Appellant submits that the conduct of DS Bunting amounted to a search. The Court of Appeal's reasons for coming to this conclusion are set out at [56]-[58] of its decision.[24] Importantly, the Court focused on the circumstances and purposes for which Mr Tamiefuna's photograph was taken. Emphasis was placed on the following factors:

[17] At [161] per Blanchard J.
[18] *R v Jefferies* [1994] 1 NZLR 290 (CA), (1993) 1 HRNZ 478 at 6.
[19] *R v Williams* [2007] 3 NZLR 207, (2007) 23 CRNZ 1 (CA) [***Williams***] at [24].
[20] *Hamed* at [50]-[51] per Elias CJ.
[21] *R v Pratt* [1994] 3 NZLR 21, (1994) 1 HRNZ 323 (CA).
[22] Evidence Act, s 30(5)(a).
[23] At [163] per Blanchard J.
[24] COA judgment at [56]-[58]: SCCB p 26-27.

(a) the Police officer was not consciously looking for evidence of offending, but rather, gathering intelligence on the apparent basis that it might be useful in the future;[25]

(b) the person taking the photograph was a Police officer and thus an agent of a state;[26]

(c) Mr Tamiefuna was going about his lawful business until the Police made him step out of the vehicle he was travelling in.[27]

27. The Court of Appeal's conclusion on this cannot be impeached.

Purpose of the photograph

28. The first and most important consideration is the purpose for which the Police took the photographs. Mr Tamiefuna had not been suspected of committing any offence at the time his photograph was taken. Whilst DS Bunting had alluded to some suspicions around stolen property, Davison J had found that the police were not engaged in such an investigation at that point in time.[28] As the Court of Appeal held:[29]

> We consider there is a reasonable expectation that [photographing individuals for identification purposes] will not occur in a public place without a good law enforcement reason.

29. The Appellant submits this reasoning cannot be criticised. There is a general public expectation that individuals will not be treated as suspects or criminals by the police in the absence of a reasonable foundation for the suspicion. It is accepted the police can exercise powers incidental to those explicitly given to them to properly carry out their functions. However, they cannot do so arbitrarily. Adopting the wording of the US Supreme Court in the seminal case of *Terry v Ohio*,[30] something more than "an inchoate and unparticularized suspicion or hunch" is required.

30. As described by Elias CJ in *Hamed*, s 21 represents "the right to be let alone".[31] Here, it had been interfered with. Mr Tamiefuna was treated like a suspect, in circumstances where DS Bunting had no reasonable cause to believe that any offence had been or would be committed. DS Bunting did not suspect Mr

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[25] at [54]-[55]: SCCB p 26.
[26] at [57]: SCCB p 27.
[27] at [58]: SCCB p 27.
[28] HC verdicts judgment at [50]: SCCB p 106.
[29] COA judgment at [57]: SCCB p 27.
[30] *Terry v Ohio* 392 US 1 (1968). This case concerned the ability of Police to conduct warrantless "stop and frisk" searches of individuals out in public. It was held that the Police could do so without implicating the Fourth Amendment protecting against unreasonable search and seizure but only if they could show there was an objective justification (ie. a reasonable suspicion) which justified the stop.
[31] *Hamed* at [10] per Elias CJ.

Tamiefuna of having committed or potentially committing any relevant offence at that point in time. As the Court of Appeal recognised, this was significant.[32] It is submitted this contravenes community expectations of good policing, but more importantly, breached Mr Tamiefuna's expectation of privacy as a citizen going about his lawful business. On this point, the Court of Appeal said:[33]

> This was not a case of surveillance where the police were consciously looking for evidence of serious criminal offending. Rather, DS Bunting took advantage of the opportunity that had presented itself to take the photographs, apparently on the basis that the information might be useful in the future.

31. DS Bunting's evidence was that the photograph was taken and uploaded for the purposes of an intelligence noting in the NIA.[34] In effect, the Appellant submits this practice was effectively tantamount to the pre-emptive gathering of evidence. This is not a lawful purpose. The Appellant submits such practices should not be allowed to foster. It carries significant risks surrounding bias, targeting, and discrimination[35] and may lead to a surge in cases involving pretextual stops under s 114 of the Land Transport Act 1998.[36] The Police cannot be permitted to conduct such inquiries and searches of people in an arbitrary manner in the absence of a reasonable suspicion. It is significant to note that in Canada, warrantless searches conducted in the absence of a reasonable suspicion have been found to violate section 8 (the s 21 equivalent) of the Canadian Charter.[37]

32. In the present case, the taking of the photographs was done in the absence of objectively discernable facts supporting a reasonable suspicion that the Appellant was involved in criminal activity. It was unjustified. The officer had, in

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[32] COA judgment at [70]: SCCB p 31.
[33] At [55]: SCCB p 26.
[34] NOE of DS Bunting: COA Evidence p 13 line 15-17.
[35] See s 19 of the NZBORA, which affirms "Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993". Allowing Police to continue photographing members of the public in circumstances where no reasonable cause exists effectively provides them with the ability to determine who they wish to photograph without having to provide any reason or justification for it. As such, underlying individual and systemic attitudes, whether conscious or unconscious, towards certain races will inevitably play a role during that decision-making process.
[36] See for example in *R v Fletcher* (2002) 19 CRNZ 399 (CA) *at [18], where* the Court of Appeal found that the power exercised under s 114 was unlawful because "the reason for stopping the car was not for the purposes of the enforcement or administration of the Act. It was because of a suspicion of drug offending and the wish to investigate that possibility". Similarly in *McGarrett v R* [2017] NZCA 204, the Court of Appeal held that the s 114 power was unlawfully executed because the stop was used as a pretext to detain the vehicle while waiting for backup to arrive to conduct a warrantless search the vehicle for drugs.
[37] See for example *R v Kang-Brown* [2008] 1 SCR 456, a Canadian Supreme Court decision which concerned the admissibility of evidence discovered through the use of a narcotics dog. The question raised by the appeal was whether the defendant was subjected to an unreasonable search when he was stopped by Police at a public bus station and the contents of his bag was subjected to a "random and speculative" sniff by a drug-detection dog. It was undisputed that the Police had no such power authorized by statute. The Supreme Court unanimously held that the dog sniff amounted to a search for the purposes of section 8 of the Charter.

effect, pre-emptively gathered evidence. This heavily points to a breach of Mr Tamiefuna's reasonable expectation of privacy.

Police as agents of the state

33. Additionally, it is relevant that DS Bunting, a police officer, was acting as an agent of the state. As the Supreme Court of Canada has repeatedly acknowledged, "there is a fundamental difference between a person's reasonable expectation of privacy in his or her dealings with the state and the same person's reasonable expectation of privacy in his or her dealings with ordinary citizens".[38]

34. When a photograph is in the possession of the police, its potential use extends far beyond its capabilities in the hands of an ordinary citizen. It is accepted that ordinarily, there is nothing about a photograph of a person which "tends to reveal intimate details of the lifestyle and personal choices of the individual".[39] But once in the possession of police, photographs are no longer constricted to just being a visual image. Instead, they transform into a fragment of a person's 'biometric information', which allows police to use it for identity verification and matching purposes, as was the case here.

35. This unique feature of photographs was highlighted by the IPCA and Privacy Commissioner in its joint report into public police photography (**joint report**):[40]

> Photographs of individuals are not, and cannot be treated as, the same as "intel notings". A digital photograph is not a description of an individual, it is an exact biometric image of that individual and no other. As such, it is sensitive personal information and must be treated accordingly. It is also capable of being analysed using facial recognition technology and other digital techniques which makes it even more important that the information is being collected, used, retained and stored lawfully.

36. On that basis, the Appellant submits he had a significant privacy interest in his photograph. The fact that it was taken without his consent and uploaded to the NIA in circumstances where he was not linked to an identifiable offence strongly suggests that it amounted to an intrusion into his reasonable expectation of privacy.

Privacy interests in public places

37. In terms of privacy interests whilst in public places, Blanchard J in *Hamed* said that generally, individuals are not entitled to "…expect to be free from the observation of others, including law enforcement officers, in open public spaces

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[38] *Aubry v Éditions Vice-Versa* [1998] 1 SCR 591 at [8], referring to *R v Duarte* [1990] 1 SCR 30 at 43-45 and *R v Wong* [1990] 3 SCR 36 at 48-55.

[39] *R v Plant* [1993] 3 SCR 281 at 293.

[40] Privacy Commissioner | Te Mana Mātapono Matatapu and Independent Police Conduct Authority | Mana Whanonga Prihimana Motuhake *Joint inquiry by the Independent Police Conduct Authority and the Privacy Commissioner into Police conduct when photographing members of the public* (September 2022) at [20].

such as a roadway or other community-owned land like a park…".[41] His Honour noted such expectations would not be objectively reasonable.[42] In contrast, Elias CJ remained unconvinced that the protection of section 21 only extended to activity in private spaces, opining that:[43]

> It is consistent with the values in the NZBORA that people may have reasonable expectations that they will be let alone by State agencies even in public spaces…

38. Her Honour's reasoning aligns with the view of Richardson J in *R v Jefferies*,[44] who similarly observed that although being in a public place was indicative of lower expectations of privacy, such privacy expectations were not completely eradicated.[45] In the Court of Appeal judgment, the Court noted that whilst individuals have a lower expectation of privacy in public places, that does not eliminate all expectations of privacy completely:[46]

> It may be readily accepted that persons in a public place can have a low expectation of privacy; they can expect to be observed. But we find it hard to accept that stepping into a public space means people are thereby submitting to the obstrusion on privacy necessarily involved in the taking of a photograph for identification purposes by police. It is both the use of the camera and the involvement of the police that makes the difference.

39. The Appellant ascribes to this view. It cannot be the case that an individual is said to waive all privacy interests they hold the moment they step into a public place, particularly when it was as a result of Police actions. It is relevant that Mr Tamiefuna had been travelling in a private vehicle moments before he was compelled to exit the vehicle. As the Court of Appeal said, "[w]e would not describe the situation as one in which Mr Tamiefuna could be taken to have expected to be photographed".[47] The Appellant agrees.

40. It is submitted that the expectation of privacy held by Mr Tamiefuna at the time he was travelling as a passenger in a private vehicle going about his business continued to be held and remained unchanged when he was ordered to exit the vehicle. The police should not be entitled to take his photograph and assert he had no expectation of privacy in circumstances where they were the ones who deprived him of that heightened privacy.

UK position: R (on the application of Wood) v Metropolitan Police Commissioner

41. The Court of Appeal's overall conclusion that a search had taken place is consistent with the English decision of *R (on the application of Wood) v*

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[41] *Hamed* at [167] per Blanchard J.
[42] At [167].
[43] At [12] per Elias CJ.
[44] *R v Jefferies* [1994] 1 NZLR 290 (CA), (1993) 1 HRNZ 478.
[45] At 9.
[46] COA judgment at [53] and [56]: SCCB p 25 and 27.
[47] COA judgment at [58]: SCCB p 27.

Metropolitan Police Commissioner, which bore similar facts.[48] There, the England and Wales Court of Appeal accepted that the photographing and subsequent retention of a person's photograph, in the absence of any obvious cause, breached a reasonable expectation of privacy.

42. In *Wood,* the police had anticipated for criminal activity to break out at a corporate event. Consequently, they sent an 'evidence-gathering team' to attend the event to "gather evidence, primarily by taking photographs and making notes which may be of subsequent value should offences be committed".[49] The claimant, Mr Wood, had been one of the attendees at the event. His photograph was taken by police, and the police subsequently identified him through the photo which was retained.

43. Mr Wood argued that his right to privacy under art 8(1) of the Human Rights Act 1998 (the equivalent to s 21 NZBORA) had been breached. The key question was whether on the facts, the claimant enjoyed a reasonable expectation of privacy.[50] The Court found that he did:[51]

> The Metropolitan Police, visibly and with no obvious cause, chose to take and keep photographs of an individual going about his lawful business in the streets of London. This action is a good deal more than the snapping of the shutter. The police are a state authority. And as I have said, the appellant could not and did not know why they were doing it and what use they might make of the pictures.
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> In these circumstances I would hold that art 8 is engaged. On the particular facts the police action, unexplained at the time it happened and carrying as it did the implication that the images would be kept and used, is a sufficient intrusion by the state into the individual's own space, his integrity, as to amount to a prima facie violation of art 8(1). It attains a sufficient level of seriousness and in the circumstances the appellant enjoyed a reasonable expectation that his privacy would not be thus invaded.

44. It is respectfully submitted there is little in the way of distinction between *Wood* and the present case from a factual standpoint. In both cases, the individual was going about their lawful business in circumstances where they aroused no police suspicion. In both cases, the individual was unaware as to why their photograph was taken, and for what purposes it would be used for. Whilst this Court is not bound by the decisions of international jurisdictions, the Appellant submits *Wood* is of assistance to the present appeal.

45. Overall, the Court of Appeal was correct to find Mr Tamiefuna's reasonable expectation of privacy had been breached. The main focus ought to be placed on the role of the Police and the purpose of their actions. As a society, there is a reasonable expectation that police will not randomly photograph members of the public for intelligence gathering purposes. That is the basic expectation in a

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[48] *R (on the application of Wood) v Metropolitan Police Commissioner* [2009] 4 All ER 951 [***Wood***].
[49] *Wood* at [66].
[50] At [22].
[51] At [45]-[46] per Laws LJ.

liberal and democratic society. This Court is invited to confirm its position on the practice.

The search was unreasonable

46. In terms of the second limb to the s 21 inquiry,[52] the question is whether the taking and subsequent retention of the photographs was unreasonable.[53] The Court of Appeal was correct in its finding that it was not. Importantly, the Police did not have legislative authority to take the photographs. For present purposes, the relevant statutes in question are the SSA, Policing Act 2008, and Privacy Act 2020.

Search and Surveillance Act 2012

47. Under the SSA, consent searches are governed by Subpart 2.[54] Under this framework, the Police are able to conduct a consent search in the absence of a warrant if certain requirements are met. This includes having a genuine purpose for the search and obtaining the informed consented of the individual prior to conducting the search.[55]

48. Whilst the Court of Appeal did not consider the legality of DS Bunting's actions in the context of the consent search provisions within the SSA,[56] the Appellant briefly addresses this in the event this Court considers it to be relevant.

49. As emphasised by Elias CJ in *R v Alsford*,[57] the strict regulation of consent searches reflects Parliament's intention to restrict the use of such searches.[58] The majority in that case also noted that the consent search provisions appeared to have been introduced to meet problems that were perceived to result from the police having an unrestricted ability to conduct consent searches (despite the existence of the warrant process).[59] In the 2007 *Search and Surveillance Powers report*,[60] the Law Commission identified that the effect of the provisions is to restrict the circumstances in which such searches can be conducted lawfully, by setting out the purposes for which a consent search may be conducted and by establishing pre-conditions for a valid consent.[61]

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[52] The first limb considers whether a search has taken place. If that is established, the second step is to consider whether it was unreasonable, as s 21 of the NZBORA only protects against unreasonable searches (and seizures).
[53] COA judgment at [59]: SCCB p 27.
[54] SSA, ss 91-96.
[55] Sections 92-93.
[56] most likely due to the fact that there was no evidence that consent had been obtained or given.
[57] *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 [***Alsford***].
[58] At [158], where Elias CJ said observed "[t]he regulation of "consent searches" is indication that the concept of consent to search is not treated by Parliament as something informal. It was seen to require controls and protection".
[59] At [22].
[60] Law Commission *Search and Surveillance Powers* (NZLC R97, 2007).
[61] At [3.65] and [3.75]-[3.83].

50. In the present case, the taking of the photograph could not be said to have been authorised by the consent search provisions within the SSA. DS Bunting did not attempt to seek consent from the Appellant, nor did the Appellant agree to have his photograph taken. Accordingly, these provisions cannot be relied on as authority for the search.

Policing Act 2008

51. Within the Policing Act 2008 ("**Policing Act**") are express provisions which establish when police can take photographs of people for future use. Sections 32-33 provide the specific circumstances in which the police may take the photograph of a person where that photograph is sought to be retained and possibly used for future police purposes.

52. Under s 32, a police officer can take the identifying particulars of a person who is in the lawful custody of the Police if that person is detained for committing an offence and is either at a Police station, or at any other place being used for Police purposes.[62] Pursuant to s 33, Police may obtain a person's identifying particulars by detaining them at "any place" if they have good cause to suspect that person of committing an offence and intends to bring proceedings against that person by way of summons.[63] Section 34 states that the personal information obtained under ss 32 or 33 may be recorded into a Police information recording system, but photographs must be destroyed as soon as practicable after a decision is made not to commence criminal proceedings against the person in respect of the offence for which the particulars were taken.[64]

53. Absent the relevant provisions at ss 32 – 34, there is nothing in way of statutory governance over this precise practice. In determining whether the search of Mr Tamiefuna was unlawful, the Court of Appeal considered these provisions and found that:[65]

> This specific conferral of the power to take photographs, or any other identifying particulars, in circumstances delimited by the section, sits unhappily alongside the notion that the police have a general right to take and retain photographs of members of the public.

54. The Appellant concurs. Given the wording of ss 32-33 which specifically sets out the circumstances in which the police are able to take photographs of a person, the Appellant submits it can be inferred that Parliament intended these situations to be exhaustive. In terms of applicability, the Court of Appeal was correct to find that the "powers to photograph in the Policing Act could not have been exercised against [the Appellant]".[66] Mr Tamiefuna was clearly not

[62] Policing Act, s 32(2).
[63] Policing Act, s 33(2).
[64] Policing Act, s 34(2).
[65] COA judgment at [63]: SCCB p 29.
[66] COA judgment at [67]: SCCB p 30.

detained.[67] Even if he was, the preconditions within ss 32 and 33 had not been made out.[68]

55. In the circumstances, the photograph of Mr Tamiefuna was obtained in contravention of ss 32-33 of the Policing Act, and its subsequent storage failed to comply with s 34. Acting outside the scope of authority expressly conferred by Parliament, the photograph was obtained unlawfully. The Court of Appeal was entitled to hold that the search was unreasonable.

Privacy Act 2020

56. The final legislative instrument relevant to assessing the legality of the search is the Privacy Act 2020 ("**Privacy Act"**). The Appellant once again submits that non-compliance with the relevant provisions of this Act points towards the search being unlawful and unreasonable.

57. The Privacy Act regulates the way in which agencies must deal with personal information about individuals.[69] Personal information is defined as "information about an identifiable individual".[70] As the Supreme Court in *R v Alsford* recognised, this covers information "from highly personal to insignificant",[71] and extends to photographs.

58. Contained within the Act are thirteen open-textured information privacy principles ("**IPPs**")[72], which regulate the handling of personal information. Those principles provide a framework for protecting an individual's right to privacy in respect of their personal information. All private and public agencies (including the police) are required to comply with these principles.[73] The Court of Appeal earlier confirmed that the IPPs are "relevant to the judgment of a court in considering what reasonable expectations of privacy ought to encompass in accordance with modern societal expectations".[74] Additionally, since the release of the Court of Appeal judgment, the joint report of the IPCA and Privacy

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[67] "Detention" is not the same as questioning. A person may be detained in circumstances where non-compliance would result in a penalty (eg. arrest), or when the words or conduct of an enforcement officer provides a reasonable belief that the person is not free to leave – see *R v M* [1995] 1 NZLR 242.
[68] Section 32 only authorises a Police officer to take the identifying particulars of a person who is in the lawful custody of the Police if that person is detained for committing an offence and is either at a Police station, or at any other place being used for Police purposes. Mr Tamiefuna was not in Police custody for committing an offence when DS Bunting took his photograph. This provision has plainly been breached. Similarly, s 33 has also been breached because DS Bunting did not have good cause to suspect Mr Tamiefuna of committing an offence. As such, there could not have been any intention to bring proceedings against Mr Tamiefuna for the non-existent offence.
[69] See Privacy Act, s 3(a), which states that one of the purposes of the Act is to promote and protect individual rights by providing a framework for protecting an individual's right to privacy of personal information, including the right of an individual to access their personal information, while recognising that other rights and interests may at times also need to be taken into account.
[70] Privacy Act, s 7(1).
[71] *Alsford* at [39].
[72] The IPPs are set out under Part 3, Subpart 1 of the Act, at s 22.
[73] Privacy Act, s 4.
[74] COA judgment at [83]: SCCB p 36.

Commissioner was published.[75] In it, emphasis is placed on the requirement for police to comply with the IPPs in circumstances where photographs are absent specific legal authority.[76]

59. The Court of Appeal found that a breach of no less than three IPPs[77] had occurred when DS Bunting took and uploaded Mr Tamiefuna's photograph:[78]

> [80] We consider that, contrary to the submissions of Ms Brook, the police's conduct on the facts of this case did involve a breach of the information privacy principles. At least three principles appear to be relevant. First, it appears likely that the police's conduct involved a breach of information privacy principle 1. This principle provides that personal information shall not be collected by any agency unless it is collected for a lawful purpose connected with a function or activity of that agency […] the collection of Mr Tamiefuna's information through the taking of his photographs was not for a lawful purpose connected with policing.
>
> [81] Secondly, in terms of information privacy principle 3(1), no claim is made by the Crown that DS Bunting took any steps to inform Mr Tamiefuna of the purpose for which his photograph was being taken, who would be able to view the photographs, whether he was authorised to take the photographs, the consequences of not consenting to the taking of the photographs or Mr Tamiefuna's rights of access to the photographs. Nor, in terms of principle 3(4), which sets out when an agency is not required to comply with 3(1), is it suggested that DS Bunting had reasonable grounds for not complying with those steps.
>
> [82] Third, information privacy principle 9 requires that an agency holding personal information must not keep the information for longer than is required for the purposes for which the information may lawfully be used. Here, as noted earlier, the photographs were not taken for the purpose of an investigation, so the image should not have been retained. This principle stands against the casual taking and retention of photographs on the basis that, some day, they might be useful. (footnotes omitted)

60. The Appellant submits the Court's findings on each of the relevant IPPs cannot be faulted. The Police fell significantly short of the standards expected of them when gathering personal information. In the present circumstances where there was no specific authority authorising the taking of the photographs, compliance with the IPPs was critical. The Court's conclusions are affirmed by the findings of

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[75] Privacy Commissioner | Te Mana Mātapono Matatapu and Independent Police Conduct Authority | Mana Whanonga Prihimana Motuhake *Joint inquiry by the Independent Police Conduct Authority and the Privacy Commissioner into Police conduct when photographing members of the public* (September 2022).

[76] See [7], "Where Police take photographs of people in contexts outside…specific statutory situations, officers must comply with the Privacy Act and the information privacy principles (IPPs) within in, taking into account the status of digital photographs as sensitive biometric information.

[77] IPPs 1, 3 and 9.

[78] COA judgment at [80]-[82]: SCCB p 35-36.

the joint report of the IPCA and Privacy Commissioner, which confirms that the Privacy Act principles act as a constraint on police conduct.[79]

61. Because DS Bunting's conduct was not authorised by statute and failed to comply with the relevant principles within the Privacy Act, the search was unlawful – and by extension – unreasonable.[80] The Court of Appeal was correct to find that Mr Tamiefuna's right to unreasonable search and seizure had been breached. Accordingly, they did not err in holding that the evidence was improperly obtained for the purposes of s 30(5)(a).

Joint Report of the IPCA and Privacy Commissioner

62. For completeness, the Court of Appeal's conclusion is consistent with the findings of the IPCA and Privacy Commissioner in its joint report published in September 2022 which focused on Police conduct when photographing members of the public. The inquiry was sparked as a result of a high volume of complaints being made by individuals who found themselves in a similar situation as Mr Tamiefuna.[81] The purpose of the inquiry was to examine the way in which photographs or video recordings of members of the public were being taken, used and retained by Police, and whether or not such practices were consistent with law and policy.[82]

63. The report's general findings most relevant to the present appeal were as follows:

    (a) Police use of photograph depends on the relevant powers that are available in each policing situation and the respective constraints that apply. Where Police are taking a photograph of a person(s) under any statutory power, they need to comply with the relevant specific legislative threshold and applicable constraints. The Privacy Act should not be used as a basis for taking photographs which circumvents those constraints.[83]

    (b) Where Police take photographs of people in contexts outside those specific statutory situations, officers must comply with the Privacy Act and the IPPs within it, taking into account the status of digital photographs as sensitive biometric information.[84]

    (c) Overall, aspects of both Police policy and practice are inconsistent with the Privacy Act framework and breach individual rights.[85]

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[79] Privacy Commissioner | Te Mana Mātapono Matatapu and Independent Police Conduct Authority | Mana Whanonga Prihimana Motuhake *Joint inquiry by the Independent Police Conduct Authority and the Privacy Commissioner into Police conduct when photographing members of the public* (September 2022) at [191]-[196].

[80] In *Hamed,* the majority of the Supreme Court held that an unlawful search will usually (but not always) be unreasonable. See Elias CJ at [49],Blanchard J at [174] and Tipping J at [226].

[81] At [1].

[82] At [4].

[83] At [6].

[84] At [7].

[85] At [10].

64. The Appellant anticipates that as Intervenor, the Privacy Commissioner will address the Court on this report in more detail.

Second ground of appeal: s 30 balancing test

Introduction

65. Leave has been granted to appeal on the question of "whether the Court of Appeal was correct in admitting the evidence under s 30 of the Evidence Act".[86]

66. Section 30 of the Evidence Act governs the admissibility of improperly obtained evidence. Where evidence has been found to be improperly obtained, a Judge must exclude the evidence where its exclusion is considered proportionate to the impropriety[87] "…by means of a balancing test that gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system of justice."[88]

67. A review of all s 30 cases involving search and seizure considered by the Court of Appeal reveal that improperly obtained evidence is ruled admissible more than 80 per cent of the time.[89] This is despite the Court of Appeal in *R v Shaheed* observing that the balancing test should not, in most cases, lead to different results than those reached under its predecessor – the prima facie exclusionary rule.[90]

68. In *Hamed*,[91] there were different views as to how the balancing test should be applied.[92] What was agreed was that s 30 required a fact-specific contextual analysis, requiring Judges to weigh factors favouring admission against those favouring exclusion to reach a conclusion as to whether exclusion of the evidence would be proportionate to the impropriety.[93] What was absent from that judgment however was clear guidance as to how each factor should be individually applied, nor the steps to be taken in the balancing exercise. This lack of guidance has resulted in two key findings:[94]

    (a) Over 80 per cent of improperly obtained evidence is admitted under section 30. The application of section 30(3) factors unduly favours admissibility.

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[86] SC leave decision at [2]: SCCB p 8.
[87] Evidence Act, s 30(4).
[88] Evidence Act, 30(2)(b).
[89] Of 114 rulings where evidence was held to be improperly obtained, only 22 cases ruled the evidence inadmissible. See Appendix A and Appendix B.
[90] *R v Shaheed* [2002] 2 NZLR 377 (CA) [***Shaheed***] at [156] per Blanchard J.
[91] *Hamed v R* [2011] NZSC 101.
[92] See Elias CJ at [57]-[59]; Blanchard J at [189]; Tipping J at [231]; McGrath J at [261].
[93] See for example Blanchard J at [189] and Tipping J at [231].
[94] Two of which were raised in the Law Commission Issues Paper for the Third Review of the Evidence Act 2006 – see Te Aka Matua o te Ture | Law Commission *Te Arotake Tuatoru i te Evidence Act 2006* | *The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) at [7.35].

(b) In more than 50 per cent of Court of Appeal s 30 search rulings Counsel has analysed, the need for an "effective and credible system of justice" is not mentioned in the balancing exercise.[95] The broader public policy considerations inherent in this assessment are only engaged in 13 per cent of all rulings where s 30 is considered.

69. The Law Commission has expressed similar concerns.[96] In its most recent review of the Evidence Act, the Commission recommended:[97]

> …there may be merit in conducting a broader review of the policy underlying section 30 in response to concerns expressed by submitters that the section is skewed too heavily in favour of admitting improperly obtained evidence.

70. The present case provides an opportunity for this Court to revisit the application of section 30. Senior Court guidance will ensure s 30 achieves its intended purpose. Guidance is sought in respect of the following:

(a) Clarity on how each section 30 factor is to be evaluated.

(b) Require Judges to give discrete consideration to "the need for an effective and credible system of justice" by adopting this as part of a <u>three-stage evaluation test:</u>

(i) Is the evidence improperly obtained?

(ii) Is exclusion of the evidence proportionate to the impropriety, having regard to the factors relevant to the balancing process under section 30(3)? (Consideration of facts specific to the case)

(iii) Is this outcome consistent with the need for an effective and credible system of justice? (Consideration of broader public policy issues).

71. Caselaw analysis suggests that proper consideration of the need for an effective and credible system of justice correlates with evidence being ruled inadmissible. Wider public policy issues favour this. A discrete test would address concerns raised by the Law Commission, ensure the Rule of Law is upheld and ensure the broader interests of justice are properly recognised. For *Mr Tamiefuna*, it is

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[95] See Appendix B for statistics. An "effective and credible system of justice was only mentioned in 48 per cent of cases (55/114).

[96] For example, the first issue relating to the uncertainties around the balancing exercise was raised by the Law Commission in its First Review of the Evidence Act in 2013: Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [4.6]-[4.17], and again in In its second (and most recent) review in 2019: Law Commission *Te Arotake Tuarua i te Evidence Act 2006* | *The Second Review of the Evidence Act 2006* (NZLC R142, 2019) at [7.3]. The second issue concerning the balancing test unduly favouring admission of evidence was also highlighted in its Second Report at [7.49]-[7.51], with the Law Commission noting that the concern had been raised by both members of the profession and the judiciary.

[97] Law Commission *Te Arotake Tuarua i te Evidence Act 2006* | *The Second Review of the Evidence Act 2006* (NZLC R142, 2019) at [7.5].

submitted that the Court of Appeal erred in admitting the improperly obtained evidence in his case.

Section 30 – legislative and case law background

72. Prior to the enactment of the Evidence Act, the admissibility of evidence obtained in breach of the NZBORA was governed by the prima facie exclusionary rule. Under this presumptive rule, evidence obtained in breach of the Bill of Rights was treated as presumptively inadmissible, unless the prosecution could demonstrate good cause for its admission.[98]

73. The prima facie exclusionary rule was replaced by the section 30 balancing test following the Court of Appeal decision of *Shaheed*,[99] in which the Court observed the prima facie exclusionary rule was too rigid, with exclusion being "almost automatic"[100] where a breach occurred. This outcome failed to give appropriate weight to the interests of the community. As articulated by Blanchard J, writing for the majority:[101]

> A system of justice will not command the respect of the community if each and every substantial breach of an accused's rights leads almost inevitably to the exclusion of crucial evidence which is reliable and probative of a serious crime.

74. The majority responded with a "balancing test" in substitution of the prima facie rule:[102]

> The majority has concluded that in place of what has become known as the prima facie exclusion rule, admissibility should be determined by means of the Judge conducting a balancing exercise in which, as a starting point, appropriate and significant weight is given to the fact that there has been a breach of a right guaranteed to a suspect by the Bill of Rights. The Judge must decide by a balancing of the relevant factors whether exclusion of the evidence is in the circumstances a response which is proportionate to the breach which has occurred of the right in question. Account is to be taken of the need for an effective and credible system of justice.

75. The "relevant factors" referred to in *Shaheed* were codified in s 30 of the Evidence Act, which combined the common law and statutory provisions relating to evidence into one place.[103] The factors identified by the majority at para [26] are mirrored in the section. These include the importance of the right breached and the severity of the intrusion,[104] the nature of the impropriety,[105] and the seriousness of the offence.[106]

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[98] As explained by Elias CJ in *Shaheed* at [18].

[99] *Shaheed.*

[100] As described by McGrath J in *Hamed* at [257], referring to the issues of the prima facie exclusionary rule and the reasons behind its demise.

[101] At [143] per Blanchard J.

[102] At [26] per Blanchard J.

[103] See Explanatory Note of the Evidence Bill 2005 (256-1).

[104] Evidence Act, s 30(3)(a).

[105] Section 30(3)(b).

[106] Section 30(3)(c).

76. Section 30 of the Evidence Act enacted in 2006 remains (almost) unchanged since enactment.[107] Unlike the *Shaheed* balancing test, it is not confined solely to evidence obtained in breach of the NZBORA, but extends to all evidence that had been improperly obtained – including where the evidence was obtained "unfairly".[108] The majority in *Shaheed* identified a number of factors that should be taken into account in the balancing exercise but did not offer guidance as to how each factor should be applied. The Court did state that the breach must be given "appropriate and significant weight" as a starting point.[109] The remainder of the balancing test was to take proper account of "the need for an effective and credible system of justice",[110] though there was no discussion as to what that involved. There has been criticism of the lack of guidance on the importance and application of each factor.[111]

77. In *R v Williams* [112] the Court of Appeal provided guidance on the application of the *Shaheed* factors, in an effort to "lay down a structured approach to the *Shaheed* test that should lead to more consistent results.[113] As Optican wrote:[114]

> Galvanised by academic criticism of *Shaheed* and its case law progency, *Williams* was a self-conscious response by the Court to perceived inconsistencies and deficiencies in judicial employment of the exclusionary rule.

78. The test balanced the seriousness of the breach against the public interest factors favouring admission of the evidence.[115] Factors either assessed the seriousness of the breach (aggravating versus mitigating factors),[116] or assessing

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[107] One minor amendment to subsection (2)(b) was made in 2016, substituting the words "a balancing process that gives appropriate weight to the impropriety **but also** takes proper account of the need for an effective and credible system of justice" with "a balancing process that gives appropriate weight to the impropriety **and** takes proper account of the need for an effective and credible system of justice". This amendment was contained within the Evidence Amendment Act 2016, to stress the fact that an effective and credible system of justice was a consideration that cut both ways in the balancing analysis.

[108] Section 30(5)(c).

[109] At [156] per Blanchard J.

[110] At [156] per Blanchard J.

[111] See *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 [***Williams***] at [147] per Glazebrook J, citing Scott Optican and Peter Sankoff "The New Exclusionary Rule: A Preliminary Assessment of R v Shaheed" [2003] NZLR 1 at 23-24.

[112] *Williams*, which was released subsequent to the enactment of the Evidence Act 2006 (4 December 2006), but prior to its commencement (1 August 2007).

[113] Majority judgment per Glazebrook J at [147].

[114] Scott Optican "*Hamed, Williams* and the Exclusionary Rule: Critiquing the Supreme Court's Approach to s 30 of the Evidence Act 2006" [2012] NZLR 605 at 608.

[115] *Williams* at [134].

[116] See [104] – [133] per Glazebrook J. Factors relevant to assessing the seriousness of the breach include the nature of the right, nature of the breach, extent of illegality, and the nature of the privacy interest. Examples of aggravating factors include circumstances where the Police fail to comply with statute, where a search has been conducted in an unreasonable manner, and where there is evidence of Police misconduct. Examples of mitigating factors include where the breach occurs in situations of urgency, and where there has been an attenuation of the link between the breach and the evidence. The presence of good faith on the part of Police was regarded as a neutral factor to the assessment.

the public interest in admitting the evidence.[117] The overall test was whether the remedy of exclusion was proportionate to the impropriety.[118] *Williams* remained the leading judgment on the balancing test until 2011.

79. In *Hamed*, the Supreme Court did not endorse the prescriptive methodology provided by *Williams.* As per Optican*:*

> Hamed does not clearly or explicitly overrule the *Williams* analytical matrix for s 30 determinations. However, neither does it apply the *Williams* scheme. The practical effect of Hamed is thus to abandon *Williams* as the required or even preferred approach to the exclusion exercise. Indeed, the judgments of the individual Justices barely mention *Williams* at all and, to a large extent, proceed as if years of post-*Williams* case law did not really exist.

80. None of the Judges explicitly confirmed the position that each section 30 factor operated either in favour of admission or exclusion.[119] However, the Court was in agreement that the balancing test required a fact-specific contextual assessment of all relevant factors.[120] Emphasis was placed on flexibility.[121] How the balancing test was to be conducted however, was left open. As a result, lower Courts which have subsequently applied the test have not been consistent in following a single approach. This in turn has led to unpredictable and inconsistent outcomes,[122] a criticism that has been echoed by practitioners and stakeholders alike.[123]

Section 30 in practice – improperly obtained evidence is usually admissible

81. A review of all s 30 Court of Appeal cases involving unlawful searches and seizures has been undertaken.[124] Statistical analysis has also been compiled.[125] Evidence which is improperly obtained is admitted in around 80 per cent of cases at appellate level. It is submitted that s 30 is not operating as intended. Since s 30 has been in effect,[126] the Court has made a total of 186 rulings on s 30

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[117] Ie. the public interest in prosecuting the offence in question. Public interest factors in favour of admitting the evidence include the seriousness of the offence, the nature and quality of the evidence, and the importance of the evidence to the prosecution's case – see [134] per Glazebrook J.
[118] *Williams* at [142].
[119] See Scott Optican "Hamed, Williams and the Exclusionary Rule: Critiquing the Supreme Court's Approach to s 30 of the Evidence Act 2006" [2012] NZLR 605 at 612.
[120] For example, Elias CJ refused to be any more prescriptive about how the balancing test should be carried out, except "…than to emphasise the need for explanation, especially in relation to the commonly-recurring (but non-mandatory and non-exhaustive) criteria in s 30(3). I would not encourage the view that courts must go through the formula of referring to each of these criteria in every case." – see [59]. McGrath on the other hand preferred a more structured approach, canvassing each of the section 30(3) factor one by one, "taking as a starting point the importance of the rights breached by the impropriety and the seriousness of the intrusion." – see [261].
[121] See for example at [282] per Gault J, observing that "[a]ll of the factors specified in s 30(3) call for value judgments that may well depend on inclinations of particular Judges, as will the comparative weighting to be accorded those factors."
[122] Law Commission *Te Arotake Tuatoru i te Evidence Act 2006* | *The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) at [7.36].
[123] At [7.36].
[124] See Appendix A.
[125] Appendix B.
[126] Since 1 August 2007.

issues involving evidence obtained from search and seizure.[127] Of those, in 114 rulings (61 per cent) the evidence in question was found to be improperly obtained. This engaged the s 30 balancing test. Out of 114 cases considering s 30, only 22 cases subsequently ruled the evidence inadmissible (19 per cent). In the remaining 92 instances (81 per cent), the evidence was admitted.

82. This contradicts the comments of the Court of Appeal in *Shaheed*, where it was noted that the new balancing test was expected to reach similar conclusions to those reached under the earlier prima facie exclusionary rule:[128]

> The [balancing process] approach should not lead, in most cases, to results different from those envisaged in earlier judgments of this Court…

83. The statistics demonstrate that this has not been achieved. The Appellant submits that s 30 is failing to operate in the way which it was intended. Pre-*Shaheed*, cases almost always excluded evidence. The opposite is now true. The pendulum has swung too far. It cannot be right that in over 80 per cent of cases where the police act unlawfully that evidence obtained as a result is admissible. The broader public policy considerations are not being met. The Appellant submits the causative reasons are twofold:

(a) Firstly, certain section 30 factors carry significant (and arguably determinative) weight in the balancing exercise, such as the nature and quality of the evidence and the seriousness of the offence. This more often than not treated as a factor in favour of admission.

(b) Secondly, the Courts fail to take account of "the need for an effective and credible system of justice" in around 50 per cent of cases despite it being a mandatory consideration. Failing to consider this prevents the Court looking at wider public policy considerations. Of all s 30 rulings, only 13 per cent meaningfully discuss a credible and effective system of justice from a broader public police perspective.[129] This wider lens is essential for the administration of justice.

84. The effect is that section 30 is not being applied in a way that is consistent with its original policy intent, and the results are too often skewed in favour of admission. *Hamed* was delivered well over a decade ago, and contrary to the predictions of the Law Commission in its First Review of the Evidence Act back in 2013, general matters of principle relating to the balancing exercise have not

[127] The Appellant has not considered the other section 30 decisions of the Court of Appeal which relate to issues of leave or intangible evidence such as confessional statements.
[128] *Shaheed* at [156] per Blanchard J.
[129] See Appendix B. 15/114 rulings. 25/114 meaningfully discuss the effective and credible system of justice, but only 15/114 addressed broader public policy concerns.

been clarified or developed over time.[130] The Appellant submits that senior Court guidance can rebalance the law by:

(a) clarifying of the meaning and weight to be placed on s 30(3) factors; and

(b) Ensuring that the Courts assess the mandatory requirement that the Courts take proper account of an "effective and credible system of justice" by requiring a 3-step process.

First issue: section 30(3) factors

Introduction

85. The results of the Appellant's review of relevant s 30 search cases show that certain section 30 factors appear to carry persuasive weight in the balancing exercise.[131] In particular, the interpretation of s 30(a) – (e) tend to be determinative of admission. The remaining factors set out at (f) – (h) generally occupy a peripheral role in the overall balancing test for search challenges, carrying limited weight as a standalone factor.[132]

86. In summary, it is submitted that guidance on the application of all factors will ensure their impact on the balancing exercise remains in line with original and current policy considerations. The s 30 balancing test is an evaluative exercise.[133] In terms of factors which carry disproportionate weight, the Appellant submits the following:

(a) **s 30(3)(a):** The importance of the right breached, and seriousness of intrusion should be a primary consideration in the balancing analysis as envisaged by *Shaheed*.[134] Adherence to fundamental human rights is a keystone of the Rule of Law and the Courts should place significant weight on breaches of protected rights.

(b) **s 30(3)(b):** The weight to be placed on the nature of the impropriety is one of degree, with improprieties at the technical level favouring admissibility. Improprieties at the deliberate/higher level favour exclusion. Reckless or careless errors ought to favour exclusion also.

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[130] Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [4.17]
[131] This issue has previously been raised by the Law Commission: see Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [4.7] and Law Commission *Te Arotake Tuatoru i te Evidence Act 2006* | *The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) at [7.40].
[132] See Appendix A for case by case analysis.
[133] In *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260, the majority of the Supreme Court said at [46] that despite the way the issue has been sometimes described in other cases, the s 30 test for exclusion of evidence was an evaluative assessment, rather than a discretionary one. See also *Williams* at [148], where the majority stated that the *Shaheed* balancing test was an evaluative one.
[134] See *Shaheed* at [26] per Blanchard J.

(c) **s 30(3)(c):** The nature and quality of the improperly obtained evidence is a factor that cuts both ways. As the anticipated probative value of the evidence increases, so does the risk that Police adopt unlawful or high-risk methods to obtain such evidence. The Courts should not enable a risk-tolerant or negligent culture amongst the Police.

(d) **s 30(3)(d):** The seriousness of the offence should not be treated as a factor which heavily favours admission.[135] As offences become more serious, so does the jeopardy faced by a defendant. The Courts ought not endorse an "ends justify the means" approach by admitting improperly obtained evidence in cases purely to bring a serious offender to account.

(e) **s 30(3)(e):** Whether there were any other investigatory techniques not involving any breach of the rights which were known to be available and not used. This factor involves two questions. Firstly, was there an alternate legal pathway to obtain the evidence? If there is not, the evidence ought to be excluded. Secondly, if there was an alternative option available that was known and not used, this also ought to favour exclusion.

s 30(3)(a) – Importance of right breached and seriousness of intrusion

87. Since the enactment of the Evidence Act, the Court of Appeal has heard 184 cases challenging the admissibility of evidence obtained through search and seizure. Of the 114 rulings where evidence was found to be improperly obtained, 102 of them involved a breach of fundamental rights.[136] In under 40 per cent of rulings where the evidence was improperly obtained was the Court prepared to find that the degree of intrusion was at the higher end.[137] Where the case involved a breach of fundamental rights such as s 21 NZBORA or other privacy rights and the intrusion was regarded as moderate to high, the Court nonetheless admitted the evidence in 38 (66 per cent) of the cases.[138]

88. Whilst the majority in *Hamed* noted that the fact of the breach was not necessarily a determinative factor, the Court nonetheless emphasized that it ought to be given considerable weight.[139] *Williams* envisaged that the "…more fundamental the value which the right protects and the more serious the intrusion on it, the greater will be the weight which must be given to the breach."[140] This approach was similarly endorsed by McGrath J in *Hamed.*[141]

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[135] Seriousness of the offending is often a key factor considered in s 30 rulings. See for example *Kalekale v R* [2016] NZCA 259; *Ward v R* [2016] NZCA 580.

[136] The remaining 12 cases found that while there was no/low breach of a right (eg: NZBORA; Guardianship; Privacy).

[137] See Appendix A and B. 44/114 rulings.

[138] 38/58 rulings.

[139] *Hamed* at [191] per Blanchard J.

[140] *Williams* at [106] per Glazebrook J.

[141] *Hamed* at [261] per McGrath J.

89. Despite these decisions, the reality is that unlawfully obtained evidence is admitted 80 per cent of the time.[142] Mr Tamiefuna is one example. Despite the Court of Appeal holding that the right breached as "an important one",[143] the evidence was nonetheless admitted. Whilst the NZBORA is not an entrenched Bill of Rights statute, it nonetheless serves to "affirm, protect, and promote human rights and fundamental freedoms in New Zealand".[144] Its significance is highlighted by s 6, which requires the Courts to insofar as it is possible, interpret all other legislation in a way that is consistent with the rights and freedoms contained within the Act. Despite this, the Courts have demonstrated a willingness to override fundamental rights to be free from unreasonable search and seizure in favour of the admission of evidence.

90. Often, the seriousness of the breach is minimized by relying on the justification that any intrusion was on the lower-end.[145] The Appellant submits this approach should be recalibrated. The NZBORA does not protect solely against serious intrusions. It is framed in a way which makes the rights absolute.[146] It is submitted that the caselaw demonstrates 'slippery slope' are borne out. It enables negligent and nonchalant practices by the police. The Courts could circumvent this by placing significant weight on this factor in the balancing test. The Courts occupy an important role in ensuring that rights are upheld and government agencies are held to account. As Elias CJ said in *Shaheed*:[147]

> … the duty of the court is vindication of rights "fundamental to all citizens, and not simply as punishment of the officer for breach or as compensation to the person affected, who may be unworthy of much consideration". For that reason, I agree with the view of the majority that monetary compensation and sentence reduction are inappropriate responses to breaches of s 21 where the prosecution seeks to use evidence obtained in breach of the Bill of Rights Act. The effective remedy in such cases is the exclusion of the evidence. (footnotes omitted)

91. This is consistent with the majority decision in *Shaheed* requiring breaches of rights to be treated as a significant factor in any balancing assessment.[148]

92. Accordingly, it is submitted that where a breach of a protected right has been established, the primary focus should be ensuring rights are upheld. In reality, this will be achieved by exclusion of the evidence. The rule of law is accordingly upheld. As recognized by Elias CJ in *Hamed*, section 30 cannot be used to deny fundamental rights.[149] Whilst the Appellant does not suggest that this factor

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[142] Appendix B. 92/114 rulings.
[143] COA judgment at [100]: SCCB p 42.
[144] Long title of the NZBORA.
[145] See for example COA judgment at [100]: SCCB p 42, where, although the right to unreasonable search and seizure was described as "important", the Court then minimised the breach by stating "we would not characterise intrusion on Mr Tamiefuna's right as a very serious one".
[146] The Act is expressed to "affirm, protect and promote human rights and fundamental freedoms in New Zealand", and to "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights".
[147] *Shaheed* at [24] per Elias CJ.
[148] *Shaheed* at [144] per Blanchard J.
[149] *Hamed* at [66] per Elias CJ.

should be determinative of the outcome,[150] it is submitted that it should be a primary factor in favour of exclusion. The State is permitted to infringe on fundamental rights on a very limited basis. The law must be applied assiduously. Consideration of s 30(3)(a) must be evaluated meaningfully. Rights intrinsically trump other factors.

s 30(3)(b) – Nature of the impropriety

93. Cases illustrate that the probability of evidence being ruled inadmissible is higher as the nature of the police impropriety in question increases in seriousness. This must be correct. However, care needs to be taken not to excuse careless breaches or ignorance of the law. There is a risk that certain types of improper police conduct may be tolerated by Courts, thereby endorsing improper behaviour.

94. In the absence of serious police impropriety,[151] the Court admitted the improperly obtained evidence in 87 per cent of rulings.[152] That correlation is expected. Serious breaches are rare. Of the 114 rulings where the s 30 analysis was engaged, the Court made findings of bad faith, deliberate conduct or recklessness in 17 instances (15 per cent). Of those, two-thirds of those involved deliberate conduct.[153] Bad faith was only made out in two rulings.[154]

95. Where bad faith, deliberate conduct or recklessness on the part of Police was established (17/114 cases), the evidence was nonetheless ruled admissible 71 per cent of the time.[155] There is no significant difference in the probability of evidence being ruled admissible where the facts include serious police impropriety and where they do not. This supports the inference that other factors are being given disproportionate weight in the balancing test. The failure of police to adhere to the law appears to carry little influence.

96. Arguably, this approach fails to give adequate regard to the important role and responsibilities of the Police as agents of the state. This enables ignorance of the law and excuses police failure to adhere to it. It is submitted that the police, as a key player in the criminal justice system, need to be held to a higher standard. As the majority in *Williams* noted, "Good faith on the part of the police is expected" and should be regarded as a neutral factor.[156] Despite this, the statistics indicate that more often than not, a finding of deliberate, reckless

[150] Indeed, this would not be consistent with the wording of section 30 which requires an evaluation of several factors.
[151] We include inadvertent mistake, good faith, carelessness or where noted as N/A in the table. 97/114 rulings.
[152] 97/114 rulings.
[153] 11/17 rulings. Less than 10 per cent of all s 30 rulings.
[154] 2/17 rulings. Less than 2 per cent of all s 30 rulings.
[155] Evidence was ruled admissible in 12/17 rulings.
[156] *Williams* at [130] per Glazebrook J.

or bad faith is not considered an implicit factor in against admission.[157] Rather other factors are then inflated to supersede the breach on rights. The public are entitled to expect that the police enforce and apply the law.

97. As the factor is currently applied by the lower Courts, it is submitted that the opposite effect is achieved. Low-level impropriety is seen as a mitigating factor. Such an approach encourages reckless or high-risk investigative practices, with the knowledge that in the event of an admissibility challenge, the Courts may well admit the evidence regardless. The current Police training materials confirm this.[158] Relevant chapters of the Police Instructions on Search and Surveillance Warrants advise that in cases of a "significant departure", exclusion of the evidential material "may" result. The corresponding inference is that low-moderate level breaches will be excused by the Courts.

Police failure to adhere to the rule of law

98. Police search powers are codified under the Search and Surveillance Act 2012.[159] This ensures fundamental rights under the NZBORA are observed by the state. The Law Commission Report on Search and Surveillance Powers recognised that "[t]he key human rights value implicated by search and surveillance powers is the right to privacy".[160] For that reason:[161]

> There is therefore much benefit to be had for both enforcement and human rights reasons in articulating as clearly as possible the boundaries of reasonable expectations of privacy and the limits that those expectations place on law enforcement activity. In our view, uncertainty can be significantly reduced if the concept is used to formulate statutory rules that regulate how search powers should be exercised.

99. The Police should not be permitted to rely on oversight, ignorance of the law, or good faith to justify non-compliance with the law. Enacted laws, particularly those closely affecting individual liberties, should be followed with precision. We see, in the Police training manuals on search and seizure, diluting of the Rule of Law as a result of s 30 forgiving non-compliance in favour of admission of evidence.

100. While breaches are assessed on a continuum, it is submitted that the presence of good faith ought not be automatically forgive the breach and be treated as a

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[157] See for example *Wood v R* [2022] NZCA 79 at [30]-[31], *Capper v R* [2021] NZCA 290 at [42]-[46], *Hall v R* [2018] NZCA 279 at [71]-[72].

[158] See Police training manuals. For the purposes of this appeal, The Appellant made an OIA request to Police seeking "copies of all written training manuals/materials used by the New Zealand Police over the past 10 years which touch on section 30 of the Evidence Act 2006. We require training materials at all levels within the Police department, including those which form part of the New Zealand Royal Police College syllabus". Due to the volume of documents identified as falling within the scope of this rest (over 100,000 results), the request was refused pursuant to s 18(f) of the OIA. However, the Police were able to supply a table summarising materials relating to section 30 contained within the Police's intranet.

[159] It is accepted that there are other pieces of legislation.

[160] Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [2.12].

[161] At [2.46].

mitigating factor. It is submitted that ignorance of the law demonstrates negligence on the part of the Police. It is accepted however that technical breaches would favour admission of the evidence.[162] The starting point must be that Police Officers act in good faith and apply the law correctly. Carelessness, recklessness and bad faith all therefore favour exclusion. Were the Court to endorse such an approach, it is submitted that this would assist with outcomes which ensure a credible and effective system of justice.

s 30(3)(c) – Nature and quality of evidence

101. This factor is often significant (and determinative) in the balancing test.[163] It appears to overwhelm other factors in favour of admissibility. As the Court of Appeal in *Williams* noted, the rationale for admitting high quality evidence is due to the stronger public interest in securing a conviction.[164] Despite the centrality of the evidence to the prosecution case not being a factor explicitly listed under section 30,[165] the Supreme Court has confirmed that it remains a relevant consideration inherent in this factor.[166]

102. In 85 per cent of rulings[167] the nature and quality of the improperly obtained evidence was regarded as highly important to the prosecution case. Correspondingly, evidence was admitted in 82 per cent of those cases.[168] On the other hand, in the 4 per cent of cases where the evidence in question occupied a lesser role to the prosecution case,[169] the evidence was admitted in only 20 per cent of those cases. This demonstrates that improperly obtained evidence is less likely to be excluded as its importance to the prosecution case increases. Where the nature and quality of evidence is regarded as high, the usual outcome is that the evidence will be admitted. This appears to have been contemplated by the Court in *Shaheed*, where the majority contemplated "…where real evidence, like drugs or a weapon, has been found…the probative value of that discovery may be a weighty factor."[170]

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[162] Such as typographical errors including an incorrect phone number out by one digit, an address which is incorrect, minor breaches of implied license or a warrant incorrectly dated.

[163] See Law Commission *Te Arotake Tuatoru i te Evidence Act 2006* | *The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) at [7.40] – based on the Commission's own analysis of recent case law.

[164] *Williams* at [14] per Glazebrook.

[165] *Shaheed* considered this would be a relevant factor to the balancing test, but when the Evidence Bill was drafted, the Select Committee considered it would be redundant given the other factors already listed – specifically, the nature and quality of the evidence and the seriousness of the offence.

[166] *Hamed* at [201] per Blanchard J, stating "There is also the important consideration that the evidence forms a central part of the prosecution case […] it is simply unrealistic not to take account of the importance of the evidence in the case when assessing whether exclusion will be proportionate to the impropriety…". See also comments of McGrath J at [276].

[167] 97/114 rulings.

[168] 80/97 rulings.

[169] Where the probative value of the evidence was low or where there was other evidence that the prosecution could rely on.

[170] *Shaheed* at [151] per Blanchard J.

103. The Appellant submits caution is needed in this interpretation. The danger of favouring admission of evidence where the nature and quality of the evidence is high is that it encourages the Police to obtain important evidence at any cost. This concern was expressed by Nandor Tanczos whilst the Evidence Bill was in Committee:[171]

> …to my mind the fact that the prosecution relies on that evidence to get the conviction makes it even more important that we exclude it, otherwise we create this enormous temptation for the investigation agencies to deliberately breach rights because that is the only evidence they will get.

104. Where the Police rely heavily on improperly obtained evidence, more care is needed. Enabling unlawful techniques to be used risks miscarriages of justice and undermines the Rule of Law. The nature and quality of the evidence cuts both ways. Were the Courts to interpret this factor as favouring exclusion where the quality and nature of the evidence is high, it would quickly correct police conduct.

105. The Court of Appeal has previously held that s 30 is not to be used as a tool for disciplining the police.[172] That is not the intention. An effective and credible system of justice is one in which no one is exempt from the law – including police. The intention is to uphold the law. The volume of s 30 cases dealt with in the Courts demonstrates the need for improved compliance. Unless there are practical consequences for police in failing to abide by the law, it is submitted there is no real incentive for them to alter their practices. We know from experience that firm judicial responses are capable of affecting change.

106. Therefore, while s 30 ought not be used to punish the police, the impact of a strengthened response to impropriety may appear to do so. The intention is to hold the State to a high standard. This is in the best interests of all relevant stakeholders – including defendants, victims, Courts, and the wider community more generally. As the Law Commission recently said in its Issues Paper:[173]

> An effective and credible system of justice is not one that permits repeated improprieties by law enforcement officers. To maintain the integrity of the justice system, it may be necessary to provide organizational incentives (through exclusion of evidence) to improve practices, thereby reducing the risk of future improprieties.

107. This factor involves multiple assessments. The nature of the evidence refers to the type of evidence obtained, such a real evidence or telecommunication data which is inherently uncontestable. The quality of the evidence involves two assessments. Firstly, the reliability of the evidence and secondly, the relevance or probative value of the evidence. Hard evidence is more reliable than confessional evidence for example. The most contentious aspect of this

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[171] (21 November 2006) 635 NZPD 6647 (Evidence Bill – In Committee, Nandor Tanczos).
[172] See *R v Bailey* [2017] NZCA 211 at [19], *Young v R* [2016] NZCA 107 at [25].
[173] Law Commission *Te Arotake Tuatoru i te Evidence Act 2006* | *The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) at [7.20].

assessment is the importance placed on the probative value of the evidence. This is often expressed as whether the evidence is critical to the prosecution. It is submitted that this factor ought not trump s 30(3)(b) and 30(3)(e) which are intertwined. Where a reckless or bad faith action by the state has resulted in collection of evidence improperly and contrary to the law, the importance of the evidence should not override those factors. That ought to favour exclusion. Conversely, a good faith technical error resulting in obtaining evidence which could have been obtained through other means would result in admission of the evidence.

s 30(3)(d) – Seriousness of offence

108. In *Underwood v R*[174], the Court of Appeal noted that as a standalone factor, the seriousness of the offence favours admission due to the enhanced public interest towards securing a conviction.[175] As the same Court said earlier in *Williams*:[176]

> Weight is given to the seriousness of the crime not because the infringed right is less valuable to a person accused of a serious crime but in recognition of the enhanced public interest in convicting and confining those who have committed serious crimes, particularly if they constitute a danger to public safety…

109. In contrast, the Court in *Hamed* cautioned against placing too much weight on the seriousness of the offence. The majority view was that s 30(3)(d) had the ability to cut both ways.[177] Elias CJ noted that seriousness of the offence does not always prompt admission of the evidence. Depending on the context, "[i]t may pull towards disproportionality or proportionality in exclusion".[178] Similar conclusions were reached by both Blanchard and Tipping JJ.[179] Despite this, the seriousness of the offence appears to be a key factor determining admissibility.

110. In terms of assessing the seriousness of the offence, traditionally the Courts have cautioned against using maximum penalties as a gauge. In *Williams*, "serious" offending was held to constitute any offence which carried a maximum penalty in the vicinity of four years or more.[180] In *Underwoo*d however, that approach was abandoned, with the Court noting that starting points were more useful in assessing the seriousness of the offence at hand.[181] Overall, the Court recommended that:[182]

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[174] *Underwood v R* [2016] NZCA 312, [2017] 2 NZLR 433 [***Underwood***].
[175] At [32] and [41] per Miller J, providing the reasons of the Court.
[176] *Williams* at [138] per Glazebrook J.
[177] McGrath and Gault JJ did not provide specific interpretations on the proper use of s 30(3)(d). However, neither expressed any disagreement with the majority view.
[178] At [65] per Elias J.
[179] At [187] and [239] respectively.
[180] *Williams* at [135] per Glazebrook J.
[181] *Underwood* at [43]-[48].
[182] At [49].

> …seriousness should be treated, like other s 30(3) criteria, as an evaluative consideration. Penalty need not be used to gauge seriousness, although Judges may sometimes find it appropriate.

111. Prosecutions which challenge the admissibility of evidence (and elect jury trial jurisdiction to do so pre-trial) are predominantly serious offending. It is agreed however that a careful, fact-specific assessment is required. Drug dealing involving a small quantity may be low-level offending despite the maximum penalty of life-imprisonment. Conversely, indecent assault may be particularly serious where it involves multiple young complainants despite the lower maximum penalty.

112. In cases where evidence was found to be improperly obtained, 90 per cent of rulings found the seriousness of the offence to be a relevant factor pursuant to s 30. [183] The factor carries considerable weight under s 30.[184]

113. Almost eighty per cent of cases found the seriousness of the offence to be a factor favouring admission.[185] Of these cases, 87 per cent ruled the evidence admissible.[186] The presence of this factor strongly correlates with admission of evidence. This is significant as it illustrates that the overwhelming weight is placed on the seriousness of the offence. This pattern illustrates that as the seriousness of the offending increases, the Courts are more likely to rule improperly obtained evidence admissible. The diluting of rights of those facing serious charges occurs. This is despite the cautionary words in *Hamed.*

114. The Law Commission conducted a similar statistical analysis in the Issues Paper for the Third Review of the Evidence Act in an effort to "gain a general sense of how section 30 is being applied".[187] This factor was identified as one often relied upon to favour admission.[188] Of the 40 cases in which improperly obtained evidence was admitted, in 24 cases the seriousness of the offence was relied on as key factor favouring admission.[189] A similar finding was drawn in relation to subsection the nature and quality of the evidence (s(3)(c)) discussed above.[190]

115. This Court is invited to assist with interpretation of this factor to recalibrate the outcomes. Caution is needed when applying the law in a way which

[183] 103/114 rulings - 90 rulings considered it in favour of admission, 13 rulings did not.
[184] Ibid.
[185] 90/114 rulings.
[186] 78/90 rulings.
[187] Law Commission *Te Arotake Tuatoru i te Evidence Act 2006* | *The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) at [7.26].
[188] At [7.29].
[189] At [7.29].
[190] At [7.29].

discriminates against those charges with the most serious crimes. Elias CJ in *Hamed* voiced this concern:[191]

> …It cannot be the case that this factor always prompts admission of the evidence obtained in breach of the New Zealand Bill of Rights Act where offending is serious. That would be to treat human rights, which are expressed as universal, as withdrawn from those charged with serious offending.

116. The Courts weigh heavily under the pressure of public interest in successful prosecution of serious crimes. But there is the corresponding public interest in ensuring that individuals are treated fairly before the law. As Tipping J relevantly observed in *Hamed*:[192]

> …while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly when the penal stakes for the accused are high. The seriousness of the offence charged is apt to cut both ways.

117. While a heavy burden, the Courts bear the responsibility of protecting the interests of individuals facing prosecution by the State. The Court is invited to endorse this approach, but making it clear that the seriousness of the offence ought not be determinative in any balancing exercise. Guidance as to the factors required for a meaningful evaluation assist. These include the maximum penalty and the likely starting point which may include considerations such as the number of alleged offenders, number of offences and victims.

118. The interpretation of the seriousness of the offence, like the nature and quality of the evidence, ought not be permitted to trump other factors favouring exclusion. A recalibration of the weight of this factor is needed. Less focus ought to placed on the seriousness of the offence (and the nature of the unlawfully obtained evidence). There would need to be a corresponding increase in focus of the breach of fundamental rights, the nature of the impropriety and whether other investigatory techniques were available. This would respect the integrity of Rule of Law which is fundamental in a free and democratic society.

s 30(3)(e) – Availability of other investigatory techniques

119. The interpretation of this factor is not settled.[193] In *Hamed*, the Justices were divided as to whether the fact there was no lawful method for the police to obtain the improperly obtained evidence in question was a factor favouring admissibility or inadmissibility. For example, Elias CJ considered it to be a "significantly exacerbating factor" in that case that the police were aware there

[191] *Hamed* at [65] per Elias CJ.
[192] At [230] per Tipping J.
[193] See Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at 236-239.

was no alternative technique available.[194] In contrast, Tipping J was of the view that:[195]

> The police could only get the evidence they sought by video surveillance in breach of the appellants' rights. This feature points towards, but not strongly towards, admission of the evidence.

120. It is noted Tipping J's reasoning is consistent with the Court in *Williams*, where the majority considered that the seriousness of the breach may be lessened by the existence of an alternative lawful power overlooked by the police.[196]

121. This division in interpretation has resulted in subsequent courts applying the factor in contradictory ways. In *Kueh v R*,[197] the Court of Appeal considered the availability of other investigatory techniques could favour exclusion in a case "…where the police knew they could carry out a search lawfully by going through proper channels but decided to take an easy (unlawful) route instead."[198] A similar stance was adopted in *M (CA84/19) v R,*[199] where the absence of any lawful techniques by which the evidence could be obtained occupied significant weight in the balancing exercise which ultimately resulted in the evidence being excluded.[200] In particular, the Court noted that "[c]onsent not having been sought**, the evidence in question should not have been in existence at all**. [201] [emphasis added]

122. Some cases have favoured the opposite position.[202] In *R v Kuru*,[203] the Court of Appeal refrained from siding with either option, and instead, treated the lack of alternative investigating techniques as a neutral factor.[204]

123. The Appellant submits this factor involves two questions:

    (a) Firstly, were there any other investigatory techniques available? This is a purely objective question.

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[194] *Hamed* at [73] per Elias CJ.
[195] *Hamed* at [246] per Tipping J.
[196] *Williams* at [110] per Glazebrook, writing for the majority.
[197] *Kueh v R* [2013] NZCA 616.
[198] At [52].
[199] *M (CA84/19) v R* [2019] NZCA 203.
[200] See [51]-[54].
[201] At [56].
[202] For example, in *McGarrett v R* [2017] NZCA 204 the Court acknowledged that there were other investigatory practices available to Police, namely the ability to get a search warrant. In the circumstances of the case, it was decided that this ability of the Police to have lawfully obtained evidence they had otherwise obtained improperly was a factor favouring admission of the evidence. In *Robinson v R* [2017] NZCA 347 the Court found the real difficulty for the appellant's challenge to the evidence from the search was that warrant would have been granted if it had been applied for.
[203] *R v Kuru* [2015] NZCA 414.
[204] At [46].

(b) Secondly, if there were, were those investigatory techniques "known to be available but were not used"? This is about the knowledge of the State agent.

124. Where other alternative techniques were unavailable and there was no other way to obtain the evidence except through unlawful measures, the Law Commission has suggested the factor be given neutral weight,[205] contrary to the views of Blanchard, Tipping and McGrath JJ in *Hamed* who all considered it should favour admissibility.[206] The Appellant takes a different view entirely. On this issue, the Appellant echoes the reasoning of the Court of Appeal in *M (CA84/19) v R,*[207] where the Court placed emphasis on the fact that the evidence in question would not be in existence, but for the impropriety. In that case, fingernail clippings were taken from the Appellant in the absence of legislative power authorising police to do so. In ruling the evidence inadmissible, the Court said the following:[208]

> Weighed in the round, our assessment is that this was a serious intrusion against the rights of the accused. The evidence could not lawfully have been obtained without consent. Consent not having been sought, the evidence in question should not have been in existence at all. A non-statutory exception, in effect permitting compulsory seizure of bodily parts outside the statutory regime, should not be countenanced. Accordingly, we rule that the contested DNA evidence is inadmissible at trial.

125. It is submitted that if the answer to the first question is no, then the fact that there was no legal way to obtain the evidence strongly favours exclusion.

126. Where there was another investigatory technique **known to be** available but not used, this ought to also favour exclusion of evidence in all but the most trivial of oversights. It is accepted that the nature of impropriety (s 30(3)(b)) will be an important interrelated factor. Where an officer deliberately acts contrary to the law, both factors will weigh heavily in favour of exclusion. Conversely, where an agent of the State is not aware of an alternative investigatory technique but ought to have been, that would likely favour exclusion because of the reckless or careless nature of the act.[209] As said in *Kueh v R*, "[a] credible justice system ought not to countenance that sort of poor police practice."[210] The basic expectation is that the State will know the scope limits upon its own power. In its Second Review of the Evidence Act 2006, the Law Commission reached the same conclusion:[211]

> We remain of the view that the availability of alternative investigatory techniques will ordinarily operate as a factor favouring exclusion of the evidence. Where police knew

[205] At [7.38]-[7.39].
[206] *Hamed* at [196], [246] and [275] respectively.
[207] *M (CA84/19) v R* [2019] NZCA 203.
[208] At [56].
[209] Under s 30(3)(b).
[210] At [52].
[211] Law Commission *Te Arotake Tuarua i te Evidence Act 2006* | *The Second Review of the Evidence Act 2006* (NZLC R142, 2019) at [7.36].

> of a legitimate way to obtain the evidence and chose not to use it, admitting the evidence may bring the justice system into disrepute and give sufficient weight to the breach of rights.

127. Clarify on this factor is sought.

Remaining factors under s 30(3)

128. The remaining factors under (f)-(h) are applied in a much more consistent manner by the Courts:

(f) **s 30(3)(f): whether there are any alternative remedies to exclusion:** in *Shaheed,* Elias CJ observed that exclusion of the evidence will be the only effective remedy in cases involving a breach of the NZBORA.[212] This view was similarly held by the Court in *Hamed*.[213] Monetary compensation will "seldom" be an appropriate remedy,[214] particularly as this could give "the appearance of the Crown buying the right to admit the evidence".[215] Accordingly, in search cases, this factor operates in favour of exclusion.

(g) **s 30(3)(g): whether the impropriety was necessary to avoid apprehended danger**: where the offending in question involves a perceived risk to the public or police, this operates in favour of admission. The more imminent the danger, the greater this factor will point towards admission.[216]

(h) **s 30(3)(h): whether there was any urgency**: similarly, where there was some level of urgency on the part of police (for example upon a belief that the evidence in question may be destroyed or lost), as a standalone factor this favours admission.[217]

129. Overall, guidance on the interpretation and importance of the factors at s 30(3)(a)-(e) in search cases will help recalibrate the law. The statistics suggest that a strong focus on the factors which prioritise the integrity of the rule of law over the seriousness of the offending/nature and quality of the evidence will result in more evidence being ruled inadmissible. This will correct the imbalance currently seen in the results showing 80 per cent of improperly obtained evidence being ruled admissible.

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[212] *Shaheed* at [24] per Elias CJ.
[213] *Hamed* at [70] per Elias CJ.
[214] See *Hamed* at [63] per Elias CJ and [247] per Tipping J.
[215] *Hamed* at [247] per Tipping J.
[216] *Hamed* at [249] per Tipping J.
[217] See *Williams* at [123] per Glazebrook:" Breaches that take place in situations of urgency, particularly where a person's safety might be in jeopardy, must be regarded as less serious than those where there was proper time for reflection and the taking of advice."

Second issue: an effective and credible system of justice

Introduction

130. The second identified error is the failure to explicitly consider "the need for an effective and credible system of justice" during the balancing process. That is despite it being a mandatory consideration framed under section 30(2)(b). This wording is taken from Blanchard J in *Shaheed* (writing for the majority), where His Honour formulated the balancing test as a process "…in which the starting point is to give appropriate and significant weight to the existence of that breach but which also **takes proper account of the need for an effective and credible system of justice**."[218]

131. This was the first time the need for "an effective and credible system of justice" was referred to in the judgment. The Court did not elaborate on its meaning. The explanatory note and commentary behind the Evidence Bill remained silent on this also. It was not until *Hamed* that this Court provided an interpretation to the phrase. Whilst each Judge provided individual reasons, there was overall agreement that an effective and credible system of justice encompassed:[219]

    (a) the public interest in bringing offenders to justice; and

    (b) the public interest in ensuring that the justice system does not condone improprieties in gathering evidence and gives substantive effect to human rights and the rule of law.

132. The former is a public interest consideration in favour of admitting the improperly obtained evidence in question. The latter has the opposite effect. Both considerations are public policy assessments which require the Court to step back and consider the implications of admissibility on the wider justice system and the community. The assessment can be contrasted with the narrower case-specific assessments undertaken under the s30(3) balancing exercise. As Blanchard J explained:[220]

> An effective and credible system of justice requires not only that offenders be brought to justice but also that impropriety on the part of the police should not readily be condoned by allowing evidence thereby obtained to be admitted as proof of the offending. It is not just a matter of balancing the impropriety on one side against the need to bring offenders to justice on the other. Both our Court of Appeal in *Shaheed* and the Supreme Court of Canada in *R v Grant* with reference to s 24(2) of the Charter of Rights and Freedoms have emphasised that society's longer-term interests will be better served by ruling out evidence whose admission would bring the system of justice into disrepute. To adapt what the Canadian Court has said, the fact of the breach means that damage has already been done to the administration of justice. The courts must ensure in the application of s 30 that evidence obtained through that

[218] At [156].
[219] *Hamed* per Elias CJ at [60]-[63], Blanchard J at [187]-[189], Tipping J at [229]-[230], and McGrath at [258].
[220] *Hamed* at [187] per Blanchard J.

> breach does not do further damage to the repute of the justice system…. (footnotes omitted).

133. And similarly, Tipping J observed:[221]

> …The reference to an effective and credible system of justice involves not only an immediate focus on the instant case but also a longer-term and wider focus on the administration of justice generally.

134. This emphasises the point made by the Court of Appeal in *Shaheed,* that a system of justice which endorses unlawful behaviour on the part of Police will not command the long-term respect of the community:[222]

> A system of justice which readily condones such conduct on the part of law enforcement officers will not command the respect of the community. A guilty verdict based on evidence obtained in this manner may lack moral authority. Society's longer term interests will be better served by ruling out such evidence.

135. In *Hamed*, whilst Blanchard, McGrath, and Tipping JJ were all agreed that the "need for an effective and credible system of justice" had dual interpretations,[223] Elias CJ adopted a stronger stance on this issue, following the Canadian approach which places emphasis on the long-term reputation of the justice system as a whole.[224] Her Honour noted that whilst an effective and credible system of justice had the capacity to point towards admissibility,[225] as with Canada, the focus in New Zealand should be directed towards "the maintenance of the integrity of, and public confidence in, the justice system over the long term".[226] For that reason, Her Honour considered that a credible and effective system of justice should be equated with "one that gives substantive effective to human rights and the rule of law",[227] focusing on the long-term integrity of the system as a whole, rather than the short-term outcome of the case at hand. …Public confidence in the effectiveness and credibility of the "system of justice" suggests a wider concern than with the outcome in a particular case. [228]

136. Despite the Supreme Court providing the necessary guidance on a taking "proper account of the need for an effective and credible system of justice" entailed, the cases reviewed by the Appellant demonstrate that this factor only considered broad public policy implications in 13 per cent of rulings in the balancing process. At present, it is submitted that Judges are more often than not applying a mistaken or one-sided interpretation to "an effective and credible system of justice" – contrary to the comments of this Court in *Hamed.*

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[221] At [229] per Tipping J.
[222] *Shaheed* at [148] per Blanchard J.
[223] *Hamed* at [187] per Blanchard J, [229] per Tipping J, [258] per McGrath J.
[224] *R v Grant* [2009] 2 SCR 353.
[225] *Hamed* at [60] per Elias CJ.
[226] At [60], quoting *R v Grant* [2009] 2 SCR 353 at [68].
[227] At [62].
[228] At [61].

How are the Courts approaching the s 30(2)(b) "taking proper account of the need for a credible and effective system of justice"?

137. In more than 50 per cent of Court of Appeal s 30 search rulings Counsel has analysed, the need for an "effective and credible system of justice" is not mentioned in the balancing exercise.[229] This is despite it being a mandatory consideration under subsection (2)(b). Of those which do discuss this consideration, just over 40 per cent (20 per cent of all rulings) appeared to "take proper account" of the need for an effective and credible system of justice. [230]

138. Where there is proper consideration of a credible and effective system of justice, 60 per cent of rulings discuss the factor in a broader sense, commenting on the integrity of the justice system as a whole and providing useful comment for the interpretation for the consideration.[231] Broader public policy considerations are only meaningfully considered in 13 per cent of all rulings where s 30 is considered. This was 15/114 cases. Of those 15 cases which undertook this important (and mandatory) exercise, nearly 50% found in favour of exclusion of the evidence.[232] This shows that taking this important step in the analysis correlates with exclusion of evidence. Generally, the lower Courts are incorrectly applying the statutory balancing test by failing to consider all mandatory considerations.

139. Where the Court has taken proper account of the need for an effective and credible system of justice from a broader public policy perspective, adequate focus is placed on citizens' rights. In *R v D*,[233] evidence was excluded due to the grossly careless conduct by the Police. The Court acknowledged that a system of justice which condones serious breaches of rights through Police misconduct will not command the respect of the community.[234] In *R v Alsford*, the Court of Appeal endorsed the lower Court's assessment that a credible justice system is not one where citizens are expected to follow the law and face sanctions if they do not, but police may ignore the law without consequence.[235]

140. Consideration of broader public policy considerations are likely to result in markedly different outcomes. Ensuring that the Courts undertake meaningful analysis will hold the police to which they are required to enforce. Stronger emphasis on the rule of law will ensure that integrity of the criminal justice system for all stakeholders including defendants and counsel. Section 30 is only

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[229] See Appendix B for statistics. An "effective and credible system of justice was only mentioned in 48 per cent of cases (55/114).

[230] "Our analysis determined that "proper consideration" was given where there more than a cursory mention of the wording in s 30. This was in 25/55 rulings.

[231] 15/25 rulings.

[232] 7/15 rulings.

[233] *R v D (CA287/10)* [2011] NZCA 69.

[234] At [78].

[235] *R v Alsford* [2015] NZCA 628 *at* [80] – [81].

engaged after evidence has been unlawfully obtained. Failing to give serious weight to that undermines respect of the Courts and the state. Defendant's rights must matter as much as police powers.

The proposed solution: a three-step evaluative test

141. A three-step evaluative test is proposed. A structure ensures that there is transparency and consistency in the balancing analysis. This addresses one concern that the current test lacks structure and guidance.[236] Additionally, it ensures that each of the statutory requirements under section 30(2)(b) are properly considered, including the competing interests at play under "an effective and credible system of justice". Overall, the proposed test is anticipated to alleviate the ambiguity and inconsistency that currently lies in the balancing process as a whole, whilst ensuring Judges still retain the necessary flexibility to deal with each set of facts on a case-by-case basis.

142. The Appellant invited the Court to interpret s 30(2) as a three-step test:

    (1) Is the evidence "improperly obtained"?

    (2) If so, is exclusion of the evidence proportionate to the impropriety, having regard to the factors relevant to the balancing process under section 30(3)? This is the case/ fact specific assessment.

    (3) Is this outcome consistent with the need for an effective and credible system of justice? This involves broader public policy considerations.

143. The first two steps are already routinely observed in section 30 decisions. They do not require further elaboration given the guidance already provided by this Court in *Hamed.* Explicitly requiring a third step is novel. The wording of the provision is clear – appropriate weight must be given to both the impropriety **and** the need for an effective and credible system of justice during the balancing process. This final step operates as a check. It ensures that the overarching interests of justice are explicitly considered, and that the outcome provides the correct message to all of the stakeholders and interests in the criminal justice system and society more generally.

Application to present case – Mr Tamiefuna

144. It is submitted the Court of Appeal erred in ruling the improperly obtained evidence admissible in Mr Tamiefuna's case.

[236] See Te Aka Matua o te Ture | Law Commission *Te Arotake Tuatoru i te Evidence Act 2006* | *The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) at [7.36].

Is the evidence improperly obtained?

145. The photograph of Mr Tamiefuna was taken in breach of his section 21 right to unreasonable search and seizure. Under section 30(5)(a), that renders the evidence improperly obtained. The Court of Appeal was correct in its finding in this aspect.

Is exclusion proportionate to the impropriety?

s 30(3)(a): Importance of right breached and seriousness of intrusion

146. The Court noted that the right to unreasonable search and seizure was an "important one",[237] denouncing taking a picture of Mr Tamiefuna in circumstances where there was no nexus between the taking of the image and the investigation of an offence.[238] Despite this, the Court did not consider the intrusion to be a "very serious one", given the photograph was taken in a public place where Mr Tamiefuna had a reduced expectation of privacy.[239]

147. The Appellant submits the Court erred in its interpretation. Underpinning the direct privacy breach are rights of freedom of movement and freedom of association. Public citizens ought not be subject to intrusive data collection by the state without good reason. This is a slippery slope. The privacy breach ought to be given significant weight in the balancing process in light of this.

148. The Court of Appeal failed to recognise the ongoing nature of the breach. Whilst the taking of the photograph itself signified an unreasonable search, the subsequent upload and retention of it in the Police national database was a continuing breach. It remains so. With respect, the Court's dismissal of the breach being at the lower end owing to Mr Tamiefuna's lack of objection does not give this adequate recognition.

149. In the present case, this factor should have favoured exclusion of the evidence, particularly in light of the Court's comments regarding the significance of the s 21 right. Indeed, the Court's broader comments at [100] regarding the inappropriate nature of random police photography appears contradictory to this finding.

s 30(3)(b): Nature of impropriety

150. The Court found it unlikely that DS Bunting was aware he was encroaching upon the Appellant's rights at the time the photograph was taken.[240] Accordingly, the Court held that the officer was acting in good faith, notwithstanding that his

[237] COA judgment at [100]: SCCB p 42.
[238] COA judgment at [100]: SCCB p 42.
[239] COA judgment at [100]: SCCB p 42.
[240] COA judgment at [101]: SCCB p 42-43.

conduct was not properly authorised by law.[241] This favour operated in favour of admission.

151. It is accepted that DS Bunting did not take the photograph of Mr Tamiefuna, knowing that it was unlawful to do so. However, the officer ought to have been aware that the laws in place surrounding the photography of individuals in public were unclear. DS Bunting ought to have known that his conduct could be subject to a later legal challenge. That is particularly since Mr Tamiefuna had not been suspected of committing any offence at the time the photograph was taken. In the absence of a codified mandate to gather evidential material, the police ought to exercise caution.

152. The officer's conduct did not amount to a technical oversight. Even if the Court was correct in finding that the officer was genuinely operating in good faith, this should not be treated as a mitigating factor during the balancing analysis. The basic presumption and expectation of the public is that all Police officers will act in good faith. DS Bunting should have known that his actions were not permitted by law. This is inherently negligent. His role is to operate within and enforce the law. Whilst not suggesting his wrongdoing was conscious or deliberate, the Appellant submits it was nevertheless an impropriety. It is submitted this factor should have been regarded as one favouring exclusion of the evidence, albeit with more limited weight than had the officer acted in a deliberate manner.

s 30(3)(c): Nature and quality of evidence

153. The Appellant accepts the Court's finding that the evidence in question was "real and important", playing a determinative role in Mr Tamiefuna's conviction.[242] It is submitted that this factor should not automatically favour admission of the evidence. The evidence in question is critical to the Crown case. Admitting the evidence endorses risky, intrusive policing practices. DS Bunting ought to have had some suspicion that taking Mr Tamiefuna's photograph and entering it into the NIA database may have been illegal. Under cross-examination, DS Bunting accepted he did not have legal authorisation to take the photograph.

154. The Appellant submits the fact the photograph was the sole evidence founding the prosecution for a serious crime should have favoured exclusion. Apart from this evidence, there was no basis at all to prosecute Mr Tamiefuna. This is particularly important given this was a pre-emptive gathering of evidence.

s 30(3)(d): Seriousness of the offence

155. The Court regarded the aggravated robbery as a "serious offence".[243] The Appellant does not dispute that, particularly given the home-invasion element of

[241] COA judgment at [101]: SCCB p 42-43.
[242] COA judgment at [102]: SCCB p 43.
[243] at [102].

the offending. This was clearly a key factor in favour of admissibility. To admit the evidence on this basis, despite the clear message that the police must not act in this way again[244] is wrong. This case endorses an 'ends justifies the means' approach to police improprieties. Whilst there was public interest in Mr Tamiefuna being held to account, there was a strong interest in denouncing the police actions in this case. The Appellant accepts that this factor favours admission, however this factor should not be given disproportionate weight in this case.

Remaining s 30(3) factors

156. The Court noted that the factors under s 30(3)(a)-(d) were "most relevant".[245] At the conclusion of assessing those factors, the Court repeated that there was "little room for the application of paras (e)-(h) of s 30(3) in the circumstances of this case".[246] Accordingly, they were not meaningfully considered. Whilst the Court was entitled to focus on the most applicable factors at subsection (a)-(d),[247] the remaining factors from (e)-(h) should not have been ignored.

157. It is submitted that each of the factors set out under subsection (3)(e)-(h) would have favoured exclusion of the evidence. There was no other investigatory technique available to Police,[248] nor was the taking of the photograph necessary to avoid apprehended danger.[249] There was no urgency to carry out the search,[250] and exclusion of the evidence was the only effective remedy that could properly vindicate the breach of Mr Tamiefuna's right.[251]

158. Had all relevant factors been meaningfully considered, it is submitted that the Court ought to have found that exclusion of the evidence was proportionate to the impropriety. The leading consideration to the balancing process should have been the importance of the right breached and the sustained nature of it. Mr Tamiefuna was going about his lawful business. An intrusive breach of his right to privacy (and association and movement) occurred by the police. DS Bunting carried the responsibility of knowing and applying the law. The breach is a continuing one as the information remains on NIA. The crime is serious, but the only evidence against Mr Tamiefuna is the improperly obtained evidence. There was no other way this evidence could have been obtained. There was no urgency. There are no other remedies for this breach.

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[244] COA judgment at [100]-[101]: SCCB p 42-43.
[245] COA judgment at [100]: SCCB p 42.
[246] COA judgment at [102]: SCCB p 43.
[247] see *Hamed* at [59] per Elias CJ, where Her Honour actively discouraged Judges from going through "the formula of referring to each [factor] in very case".
[248] Section 30(3)(e).
[249] Section 30(3)(g).
[250] Section 30(3)(h).
[251] Section 30(3)(f).

159. It is submitted that the s 30(3) balancing test ought to have resulted in exclusion of the photograph.

Is exclusion consistent with the need for an effective and credible system of justice?

160. The Court of Appeal said the following when considering whether or not admission of the evidence was consistent with the need for an effective and credible system of justice:[252]

> The need for an effective and credible system of justice is not a consideration that invariably favours the admission of improperly obtained evidence, but it clearly does so here given our conclusions about the seriousness of the intrusion and the nature of the impropriety.

161. The Appellant submits the need for an effective and credible system of justice was not properly taken into account. While the words are included at paras [99] and [103], there is no in-depth analysis. The Court implicitly considered the broader implications of this decision. The put police on notice that, if this were to happen again, it would not be considered favorably by the Court:[253]

> Turning to para (b) we think it likely that DS Bunting would not have been aware that he was breaching Mr Tamiefuna's rights, and we would not characterise the impropriety involved as deliberate, reckless or done in bad faith. A different conclusion might in future be justified if police continue to take photographs of persons in circumstances not properly authorised by law.

162. There is no consideration of the rule of law, nor the impact that admission of the evidence would have on the long-term repute of the justice system. In the Appellant's submission, the Court of Appeal had erroneously equated an effective and credible system of justice with one that ensured that offenders were brought to justice. As this Court in *Hamed* made clear, that is only one of two limbs to the inquiry. The short-term interests of justice will always tend to favour admitting improperly obtained evidence, so long as it is probative and reliable to the prosecution case. However, a justice system cannot be truly said to be effective if it fails to give recognition to protected human rights. Nor can it be said to be credible if the Police can be excused from the rule of law.

163. The Appellant reiterates the following remark made by Blanchard J in *Hamed*:[254]

> …society's longer-term interests will be better served by ruling out evidence whose admission would bring the system of justice into disrepute. To adapt what the Canadian Court has said, the fact of the breach means that damage has already been done to the administration of justice. The courts must ensure in the application of s 30 that evidence obtained through that breach does not do further damage to the repute of the justice system…

164. In the circumstances, whilst there is a short-term public interest in ensuring that Mr Tamiefuna is brought to account for the offending, it is submitted the long-

[252] COA judgment at [103]: SCCB p 43.
[253] COA judgment at [101]: SCCB p 42-43.
[254] *Hamed* at [187] per Blanchard J.

term interests of society must prevail. An effective and credible system of justice would require the evidence to be excluded.

Conclusion

165. The appeal ought to be allowed and the conviction quashed.

Dated 26 January 2024

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Susan Gray | Emma Priest| Celine Shao
Counsel for **the Appellant**

KEY:
✓ - Factor present to the ruling.
X – Factor not present in the ruling.
NA – Not Applicable
Yellow highlighted cases – include separate rulings within the same case

Appendix A[1]:

			(a) Importance of right and significance of intrusion		(b) Nature of breach				(c)	(d)	(e)	(f)	(g)	(h)	2(b)	
Case	**Year**	**Evidence in question**	**Right is important**	**Intrusion is serious**	**Deliberate**	**Reckless**	**Bad faith**	**Inadvertent mistake**	**Evidence critical to Crown case/ probative**	**Seriousness favour admissibility**	**Other investigatory techniques available**	**Alternative remedies available**	**Breach necessary to avoid danger to Police/others**	**Urgent**	**Effective & credible**	**Admissible?**
Finau v R [2023] NZCA 448[2]	2023	Intangible	✓	✓	NA	NA	X	✓ genuine error	✓	✓	NA	NA	NA	✓	X	✓
Carran v R [2023] NZCA 287	2023	Drugs Class A	✓	X	NA	NA	X	✓	✓	✓	X	X	X	X	X	✓
Tamiefuna v R [2023] NZCA 163	2023	Photo	✓	X	X	X	X	✓ unaware	✓	✓	NA	NA	NA	NA	✓	✓
Best v R [2023] NZCA 101	2023	Drugs Class A	✓	X	X	NA	X	✓ not egregious	✓	✓	✓	X	X	X	✓	✓
Sellars v R [2022] NZCA 475	2022	Stolen Property	X [3]	X	NA	X	X	✓	NA	NA	NA	NA	NA	X	✓	✓
Moore v R [2022] NZCA 109	2022	SD card	X marginal	X	NA	NA	NA	✓ Low impropriety	✓	✓	✓	NA	NA	X	✓	✓
Wood v R [2022] NZCA 79	2022	Stolen Property	✓	X	X	NA	NA	✓ good faith	✓	NA	✓	NA	NA	NA	X	✓
	2022	Drugs – Class A/ B	✓	X	NA	NA	NA	✓ genuine belief	✓	✓	✓	NA	NA	✓	X	✓
Noor v R [2021] NZCA 703	2021	Drugs – Class B	✓	X	NA	NA	X	✓ disorganised	NA	X	✓	NA	NA	✓	X	✓
D (CA419/2021) v R [2021] NZCA 678	2021	Phone	✓	✓	X	X	X	✓ genuine belief	✓	✓	✓	NA	NA	NA	X	✓
	2021	Phone	✓	✓	X	X	X	✓	✓	✓	✓	NA	NA	NA	X	✓

[1] Cases compiled by a search of Court of Appeal cases which cite s 30 Evidence Act 2006, exclusively dealing with real evidence from searches which are found to have breach fundamental rights. Cases not included in the table are those which were not breaches of rights closely linked to search and seizure rights such as *R v Reynolds* [2017] NZCA 611, *Ashby v R* [2017] NZCA 555, *R v Gollan* [2010] NZCA 86, *Ahuja v Police* [2019] NZCA 642 and *Yoganathan v R* [2017] NZCA 225.
[2] *Finau v R* [2023] NZCA 448 has not yet been reported but has been included in the table as it is directly relevant.
[3] Court found there was no right breached but the evidence was none the less unreasonable.

			(a) Importance of right and significance of intrusion		(b) Nature of breach				(c)	(d)	(e)	(f)	(g)	(h)	2(b)	
Case	**Year**	**Evidence in question**	**Right is important**	**Intrusion is serious**	**Deliberate**	**Reckless**	**Bad faith**	**Inadvertent mistake**	**Evidence critical to Crown case/ probative**	**Seriousness favour admissibility**	**Other investigatory techniques available**	**Alternative remedies available**	**Breach necessary to avoid danger to Police/others**	**Urgent**	**Effective & credible**	**Admissible?**
De Souza v R [2021] NZCA 682	2021	Phone	✓	X	NA	X	X	✓	✓	✓	✓	X	NA	NA	✓	✓
Gardner v R [2021] NZCA 650	2021	Drugs – Class A	✓ car	X	NA	NA	X	✓ No deliberate flouting	✓	X	✓	NA	NA	✓	✓	✓
Naketoa v R [2021] NZCA 468	2021	Texts	✓	✓	✓	NA	X	NA	✓	✓	NA	X	NA	NA	X	✓
Capper v R [2021] NZCA 290	2021	Drugs – Class A	✓ low	X	NA	NA	NA	✓ good faith	✓	✓	✓	NA	NA	X	✓	✓
Dodd v R [2021] NZCA 101	2021	Texts	✓	✓	NA	X	X	✓ low	✓	✓	NA	NA	NA	NA	X	✓
Beanland v R [2020] NZCA 528	2020	Images	✓	✓	NA	NA	X	✓ gross carelessness	✓	✓	NA	X	X	X	X	X
Mellas v R [2020] NZCA 418	2020	Drugs – Class A + B + C	✓ car	X	NA	NA	X	✓ carelessness	✓	X	✓	X	X	X	✓	X
Heta v R [2020] NZCA 273	2020	Drugs	✓	Moderate	NA	X	X	✓ careless	✓	✓	✓	NA	X	X	✓[4]	X
Tupoumalohi v R [2020] NZCA 117	2020	Cellphone	✓	✓	NA	X	X	✓	✓	✓	✓	X	NA	X	✓	✓
Court v R [2020] NZCA 76	2020	Firearms	✓	✓	NA	✓ grossly negligent	NA	NA	✓	✓	✓	X	X	X	✓[5]	X

[4] At [45] "an effective and credible system of justice depends on the lawful prosecution of alleged offending. Given, in particular, our assessment of the relative ease with which the police could have expanded the lawful boundaries of the search, the balancing exercise overall calls for exclusion".

[5] At [49] Reference to discussion in *Hamed v R* [60] – [63]. At [51] "It needs to be quite clear to police that care must be taken to understand the nature and limits of warrantless search powers. Permitting the fruits of a search of this kind is used as evidence risks being seen as condonation of serious illegality. It would also send the wrong message to the community about the commitment of the courts to protecting the rights guaranteed by NZBORA".

			(a) Importance of right and significance of intrusion		(b) Nature of breach				(c)	(d)	(e)	(f)	(g)	(h)	2(b)	
Case	**Year**	**Evidence in question**	**Right is important**	**Intrusion is serious**	**Deliberate**	**Reckless**	**Bad faith**	**Inadvertent mistake**	**Evidence critical to Crown case/ probative**	**Seriousness favour admissibility**	**Other investigatory techniques available**	**Alternative remedies available**	**Breach necessary to avoid danger to Police/others**	**Urgent**	**Effective & credible**	**Admissible?**
Butland v R [2019] NZCA 376	2019	DNA	✓[6]	✓	X	X	X	✓ very low level	✓	✓	NA	NA	NA	NA	✓	✓
Mawhinney v Auckland Council [2019] NZCA 313	2019	Unconsented Dwelling	✓	✓	NA	NA	X	✓ low end careless	✓	✓	NA	NA	NA	NA	X	✓
Topia v R [2019] NZCA 263	2019	Drugs	✓	X	X	NA	NA	✓	✓	✓	NA	NA	NA	NA	X	✓
M v R [2019] NZCA 203	2019	DNA	✓	✓	NA	NA	X	✓ careless	✓	✓	X	X	X	✓	X	X
Wilkie v R [2019] NZCA 62	2019	Texts	✓	X	NA	X	X	✓ ignorant	✓	✓	✓	NA	X	X	✓	✓[7]
Gaitau v R [2019] NZCA 32	2019	Stolen goods	✓	X	✓	NA	NA	NA	NA	✓	NA	NA	NA	NA	X	✓
Reti v R [2019] NZCA 17	2019	Drugs – via PO	✓	NA	X	X	X	NA	NA	NA	NA	NA	NA	NA	✓	X
Makaea v R [2018] NZCA 284	2018	Texts – via PO	✓	✓	NA	NA	NA	✓ careless	✓	✓	✓	NA	NA	NA	X	✓
Hall v R [2018] NZCA 279	2018	Drugs	X	X	X	X	X	✓ Good faith	✓	✓	✓	NA	NA	NA	X	✓
Moore v R [2017] NZCA 577	2017	Weapon/ Drugs	✓	✓[8]	NA	X	X	✓ careless	✓	✓	✓	NA	NA	NA	X	✓
W v R [2017] NZCA 522	2017	Data on SD	✓	✓	NA	NA	X	NA	✓	✓	✓	NA	NA	X	✓	✓

[6] Improperly obtained as in breach of the Criminal Investigations (Bodily Samples) Act 1995 not of the NZBORA, DNA sample unlawfully retained by Police.
[7] At [31] "the powers under s 30 should not be used as an instrument to discipline the police but to vindicate rights."
[8] At [14] Mr Moor had a low expectation of privacy in a vehicle which he did not own, but found the search of his person was a serious intrusion.

			(a) Importance of right and significance of intrusion		(b) Nature of breach				(c)	(d)	(e)	(f)	(g)	(h)	2(b)	
Case	**Year**	**Evidence in question**	**Right is important**	**Intrusion is serious**	**Deliberate**	**Reckless**	**Bad faith**	**Inadvertent mistake**	**Evidence critical to Crown case/ probative**	**Seriousness favour admissibility**	**Other investigatory techniques available**	**Alternative remedies available**	**Breach necessary to avoid danger to Police/others**	**Urgent**	**Effective & credible**	**Admissible?**
R v Toki [2017] NZCA 513	2017	DNA sample	✓	✓	✓	NA	NA	NA	✓	✓	NA	NA	NA	NA	✓	X
Robinson v R [2017] NZCA 347	2017	Drugs – Class C	✓	✓	X	X	X	NA	✓	✓	✓	X	X	✓	X	✓
Neho v R [2017] NZCA 324	2017	Cellphone	✓	X	NA	NA	X	NA	✓	✓	✓	NA	✓	✓	X	✓
Erasmus v R [2017] NZCA 222	2017	Drugs	X[9]	X	X	X	X	✓ misapprehension	✓	✓	NA	NA	NA	NA	X	✓
R v Bailey [2017] NZCA 211	2017	Drugs in car	✓	Moderate	NA	NA	NA	✓ no improper motive	✓	✓	✓	NA	NA	NA	✓	✓
	2017	Cash on person	✓	✓	NA	NA	NA	NA	X not determinative	NA	NA	NA	NA	NA	✓	X
McGarrett v R [2017] NZCA 204	2017	Drugs – class A	✓	X	X	X	X	✓ mistake and misunderstanding	NA	✓	✓	NA	NA	NA	✓	✓
Heemi v R [2017] NZCA 191	2017	Stolen goods	✓	X	NA	NA	x	✓ Good faith	NA	X Neutral	NA	NA	NA	NA	✓	✓
King v R [2017] NZCA 186	2017	Drugs	✓	✓	X	NA	NA	✓ Good faith	✓	✓	NA	X	NA	NA	✓	✓
Catley v R [2017] NZCA 154	2017	Drugs – Class A	✓	X	X	X	X	✓ Failure counterproductive to police	✓	✓	NA	NA	NA	NA	✓	✓
Nicol v R [2017] NZCA 140	2017	Texts	✓	✓	NA	NA	NA	NA	✓	✓	NA	NA	NA	NA	X	✓

[9] Breach being the failure of the police to provide Mr Erasmus a copy of the search warrant, the right was not considered of such importance which would lead to the exclusion of the evidence.

			(a) Importance of right and significance of intrusion		(b) Nature of breach				(c)	(d)	(e)	(f)	(g)	(h)	2(b)	
Case	**Year**	**Evidence in question**	**Right is important**	**Intrusion is serious**	**Deliberate**	**Reckless**	**Bad faith**	**Inadvertent mistake**	**Evidence critical to Crown case/ probative**	**Seriousness favour admissibility**	**Other investigatory techniques available**	**Alternative remedies available**	**Breach necessary to avoid danger to Police/others**	**Urgent**	**Effective & credible**	**Admissible?**
Haliday v R [2017] NZCA 108	2017	Drugs + cash	✓	X	NA	X	X	✓	✓	✓	✓	X	- [10]	✓	X	✓
Kahotea v R [2017] NZCA 82	2017	Drugs + cash	✓	X	NA	NA	X	NA	✓	✓	✓	NA	NA	NA	X	✓
Moon v R [2017] NZCA 56	2017	Cellphone	✓	✓	NA	NA	X	✓ sloppy	X	✓	✓	X	NA	X	X	X
SPF V R [2016] NZCA 606	2016	Documents	✓	✓	NA	NA	✓	NA	X	X	✓	NA	NA	NA	✓	X
Ward v R [2016] NZCA 580	2016	Drugs + firearm	✓ car	X	✓	X	X	NA	✓	✓	✓ neutral	X	X	✓	X	✓
Alamoti v R [2016] NZCA 402	2016	Drugs	✓ car	X	X	X	X	✓	✓	✓	✓	NA	NA	NA	X	✓
	2016	Motel	✓ motel less than a home	X	NA	NA	NA	NA	✓	NA	NA	NA	NA	NA	X	✓[11]
Underwood v R [2016] NZCA 312	2016	Images	✓	X	NA	NA	NA	✓ good faith	✓	✓	X	NA	NA	NA	✓	✓
Kalekale v R [2016] NZCA 259	2016	Clothing	✓	✓	X	X	X	✓	✓ important	✓	✓ neutral	X	X	✓	✓	✓
Murray v R [2016] NZCA 221	2016	Intercepted conversation	✓	Moderate	NA	NA	X	✓ careless	✓	✓	✓	NA	NA	X	✓	✓
Birkinshaw v R [2016] NZCA 220	2016	Drugs	✓	x	X	X	X	✓	✓	✓	x	X	X	✓	X	✓

[10] Justices are divided but the issue does not turn on this point.

[11] Minimal discussion regarding the search of the motel, only discussion on the low privacy interest. Relied on the discussion around the improperly obtained drug evidence.

			(a) Importance of right and significance of intrusion		(b) Nature of breach				(c)	(d)	(e)	(f)	(g)	(h)	2(b)	
Case	**Year**	**Evidence in question**	**Right is important**	**Intrusion is serious**	**Deliberate**	**Reckless**	**Bad faith**	**Inadvertent mistake**	**Evidence critical to Crown case/ probative**	**Seriousness favour admissibility**	**Other investigatory techniques available**	**Alternative remedies available**	**Breach necessary to avoid danger to Police/others**	**Urgent**	**Effective & credible**	**Admissible?**
Rihia v R [2016] NZCA 200	2016	Synthetic Drugs	✓ motel less than home	X	X	X	X	✓	✓	X neutral	✓	NA	NA	✓	✓	✓
T (CA438/2015) v R [2016] NZCA 148	2016	DNA/Blood	✓	Moderate	X	X	X	✓ Lower end of scale	✓	✓	X	NA	NA	✓	✓	✓
Pene v R [2016] NZCA 153[12]	2016	Teleco + calls	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	✓	X	✓
Young v R [2016] NZCA 107	2016	Drugs	✓ car	✓	X	X	X	✓ lower end of the scale	✓	✓	✓	NA	NA	X	✓	✓
R v Alsford [2015] NZCA 628	2015	Drugs	✓	✓	NA	NA	X	NA	✓	NA	X	X	X	X	✓[13]	X
Ferens v R [2015] NZCA 564	2015	Emails	✓	✓	NA	NA	NA	✓ grossly negligent	✓	✓	NA	NA	NA	NA	X	X
R v Kuru [2015] NZCA 414	2015	DNA/ Blood	✓	✓	X	X	X	✓	✓	✓	X	X	X	NA	✓	X
Dickson v R [2015] NZCA 286	2015	Text data	X	X	NA	X	X	✓ careless	✓	NA	NA	NA	NA	NA	X	✓
	2015	CSD - photo number plate	✓	X	X	X	X	✓ oversight	NA	✓	NA	NA	NA	NA	X	✓
	2015	Intercepted comms.	✓	✓	X	X	X	✓ Good faith	✓	✓	X	NA	NA	NA	X	✓
Swain v R [2015] NZCA 216	2015	Blood/vehicle	X low moderate	X	X	X	X	✓ impropriety harsh label	✓	NA	NA	NA	NA	NA	X	✓

[12] Light discussion. The Court of Appeal agreed with the lower Court that the call should be admissible.

[13] Referred to High court decision at [80] "A credible system of justice is not one where the citizenry is expected to follow the law and face sanctions if they do not, but the police may ignore the law without consequence".

			(a) Importance of right and significance of intrusion		(b) Nature of breach				(c)	(d)	(e)	(f)	(g)	(h)	2(b)	
Case	**Year**	**Evidence in question**	**Right is important**	**Intrusion is serious**	**Deliberate**	**Reckless**	**Bad faith**	**Inadvertent mistake**	**Evidence critical to Crown case/ probative**	**Seriousness favour admissibility**	**Other investigatory techniques available**	**Alternative remedies available**	**Breach necessary to avoid danger to Police/others**	**Urgent**	**Effective & credible**	**Admissible?**
McLean v R [2015] NZCA 101	2015	Texts	✓	✓	✓	✓	X	X	✓	✓	✓	X	X	X	✓	X
F v R [2014] NZCA 313	2014	Stolen property	✓	✓	X	X	X	✓ genuine belief	✓	✓	✓	X	✓	✓	✓	✓
Abercrombie v R [2014] NZCA 132	2014	Drugs/cash/pistol	X lower end of spectrum	X	X	X	X	✓ good faith	✓	✓	NA	NA	NA	NA	X	✓
Kueh v R [2013] NZCA 616	2013	Cash	X Rental car	X	X	X	✓	X	✓	✓	✓	X	X	X	✓	✓
Kondratyeva v R [2013] NZCA 597	2013	Ill treated cats	✓	X	X	X	X	Not significant Good faith	✓	NA	✓	X	X	✓	X	✓
R v Anderson [2013] NZCA 511	2013	Stolen goods	X	X	X	X	X	✓	✓	✓	NA	NA	NA	NA	X	✓
Hoete v R [2013] NZCA 432	2013	Drugs	✓	X	NA	X	X	NA	✓	✓	✓	X	X	X	✓	✓
Banks v R [2013] NZCA 377	2013	Drugs Class A	✓	Moderate	X	X	X	✓	NA	✓	NA	NA	NA	NA	✓	✓
R v Balsley [2013] NZCA 258	2013	Drugs Class C	✓	Moderate	✓	X	X	X	✓	✓	✓	X	✓	✓	✓	✓
Mitchell v R [2013] NZCA 251	2013	Stolen property/ drugs	✓ less than usual	X	NA	NA	NA	✓	✓	NA	✓	NA	NA	NA	✓	✓
Dumolo v R [2013] NZCA 223	2013	Drugs – Class C	✓	✓	NA	NA	NA	NA	✓	X	✓	NA	NA	NA	X	X
Pettus v R [2013] NZCA 157	2013	Hair sample/ DNA	✓[14]	X	✓	X	X	X	✓	✓	X	✓	X	X	✓	✓

[14] The right breached in this case was the adult's guardianship rights and not NZBORA. It is included as the breach was directly linked to the breach.

			(a) Importance of right and significance of intrusion		(b) Nature of breach				(c)	(d)	(e)	(f)	(g)	(h)	2(b)	
Case	**Year**	**Evidence in question**	**Right is important**	**Intrusion is serious**	**Deliberate**	**Reckless**	**Bad faith**	**Inadvertent mistake**	**Evidence critical to Crown case/ probative**	**Seriousness favour admissibility**	**Other investigatory techniques available**	**Alternative remedies available**	**Breach necessary to avoid danger to Police/others**	**Urgent**	**Effective & credible**	**Admissible?**
D (CA549 12) v R [2012] NZCA 523	2012	Stolen goods	✓	✓	X	X	X	✓	✓	✓	NA	NA	NA	NA	X	✓
Newton v R [2012] NZCA 483	2012	Drugs Class A	NA	NA	X	X	X	✓ grossly careless, unintentional error, careless conduct	✓	✓	NA	NA	NA	NA	X	✓
Tye v R [2012] NZCA 382	2012	Footage: Drugs/manufacture tools	✓ shed outside	Moderate	X	✓	X	X	✓	✓	X	X	NA	NA	✓	✓
Shirtliff v R [2012] NZCA 336	2012	Drugs Class A/C	✓	✓	X	X	X	✓ good faith	✓	✓	X	NA	NA	✓	X	✓
Arnerich v R [2012] NZCA 291	2012	Objectionable images	✓	✓	X	X	X	NA	✓	X	NA	NA	NA	x	X	X
Eruera v R [2012] NZCA 288	2012	Drugs/fire arm	✓	✓	X	X	X	✓	✓	✓	NA	NA	NA	✓	X	✓
G (CA741/11) v R [2012] NZCA 152	2012	Images-computer	✓	x	X	X	X	✓	✓	✓	✓	NA	NA	NA	X	✓
Galway v R [2012] NZCA 94	2012	Photos taken during SW	✓ open farm land	X	NA	NA	NA	NA	X	X	NA	NA	NA	NA	X	✓
Nouri v R [2012] NZCA 35	2012	Drugs Class A/B/C	X hotel room	X	X	X	X	✓ careless	✓	✓	X	X	X	✓	X	✓
JF v R [2011] NZCA 645	2011	Drugs – Class A	✓	X	X	✓	X	X	✓	✓	NA	X	NA	NA	X	✓
Corless v R [2011] NZCA 425	2011	Drugs Class A	✓	Moderate	NA	X	X	NA	✓	✓	X	NA	✓	✓	X	✓

			(a) Importance of right and significance of intrusion		(b) Nature of breach				(c)	(d)	(e)	(f)	(g)	(h)	2(b)	
Case	**Year**	**Evidence in question**	**Right is important**	**Intrusion is serious**	**Deliberate**	**Reckless**	**Bad faith**	**Inadvertent mistake**	**Evidence critical to Crown case/ probative**	**Seriousness favour admissibility**	**Other investigatory techniques available**	**Alternative remedies available**	**Breach necessary to avoid danger to Police/others**	**Urgent**	**Effective & credible**	**Admissible?**
R v Chapman [2011] NZCA 410	2011	Drugs Class B	✓ car	Moderate	X	X	X	✓ hastily	✓	✓	NA	NA	NA	NA	✓[15]	✓
Matenga v R [2011] NZCA 389	2011	Drugs- class c	✓	✓	X	X	X	✓ sloppy	✓	X	✓	NA	NA	X	✓	X
Stevenson v R [2011] NZCA 220	2011	Drugs – class A	✓	✓	X	X	X	✓ good faith	✓	✓	NA	NA	NA	NA	X	✓
Haggie v R [2011] NZCA 221	2011	Drugs – Class C	✓	X	X	X	X	✓ careless	✓	✓	✓	NA	X	X	✓	✓
Carroll v R [2011] NZCA 174	2011	Drugs – Class C	✓ car	X	NA	X	X	NA	NA	✓	NA	NA	NA	NA	✓	✓
	2011	Drugs – Class A	✓ car	X	NA	NA	X	✓ Low impropriety	✓	✓	NA	NA	NA	NA	✓	✓
R v D (CA287/10) [2011] NZCA 69	2011	Objectionable images	✓	✓	X	X	X	✓ very careless	✓	x	NA	X	NA	NA	✓[16]	X
Hunt v R [2010] NZCA 528	2010	Footage	✓	X	X	X	X	✓	✓	✓	X	X	✓	✓	✓	✓
Rimine v R [2010] NZCA 462	2010	Drugs – class A	✓	X	NA	NA	X	✓ error of judgement	✓	✓	X	X	X	X	✓	✓
Hodgkinson v R (CA221/10, 7 October 2010)	2010	Footage of class c cultivation	✓ not the highest	✓	✓	NA	X	NA	✓	✓	✓ available but not practicable	NA	NA	NA	X	✓
Shirinov v R [2010] NZCA 434	2010	Drugs Class A	✓ car	X	NA	NA	X	✓ no gross impropriety	✓	✓	X	X	NA	NA	✓	✓

[15] At [22] "we accept that the need for an effective and credible system of justice is not a factor which falls to be considered as a separate part of the balancing exercise….However, treating the need for an effective and credible system of justice as a separate factor in the balancing exercise did not lead the Judge to error on the ultimate issue".

[16] At [79] "reflects the idea that a system of justice which readily condones serious breaches of rights committed through grossly careless police conduct will not command the respect of the community".

			(a) Importance of right and significance of intrusion		(b) Nature of breach				(c)	(d)	(e)	(f)	(g)	(h)	2(b)	
Case	**Year**	**Evidence in question**	**Right is important**	**Intrusion is serious**	**Deliberate**	**Reckless**	**Bad faith**	**Inadvertent mistake**	**Evidence critical to Crown case/ probative**	**Seriousness favour admissibility**	**Other investigatory techniques available**	**Alternative remedies available**	**Breach necessary to avoid danger to Police/others**	**Urgent**	**Effective & credible**	**Admissible?**
Duncan v R [2010] NZCA 318	2012	Drugs Class A	✓	✓	NA	X	X	✓ Gross carelessness – good faith	✓	✓	X	X	X	X	✓	X
Pollard v R [2010] NZCA 294	2010	Drugs – Class A	✓ garage	✓	✓	NA	NA	NA	✓	✓	✓	NA	NA	X	X	X
McArley v R [2010] NZCA 99	2010	Drugs – Class C	✓	Moderate	✓	NA	X	✓Good faith. Need to ensure safety	✓	✓	X	X	✓	X	X	✓
Wanoa v R [2010] NZCA 33	2010	Drugs – Class C	✓	X	X	NA	X	✓	✓	✓	NA	NA	NA	NA	X	✓
R v Taylor [2009] NZCA 462	2009	Controlled drugs	✓	X	NA	NA	NA	✓ evidence could have been searched	NA	X	✓ inevitable	NA	NA	NA	✓	✓
R v Ulyatt [2009] NZCA 360	2009	Drugs – Class C	✓	Moderate	NA	NA	NA	✓ good faith sloppy	✓	✓	X	X	X	X	X	✓
R v Padden [2009] NZCA 296	2009	Firearms	✓	✓	X	NA	X	✓ careless	✓	✓	NA	NA	NA	NA	✓	✓
R v Moreton [2009] NZCA 121	2009	Drugs – Class C	✓ car	X	X	X	X	NA	✓	✓	✓	X	X	✓	X	✓
R v Adams [2008] NZCA 259	2008	Drugs – Class C	✓	✓	✓	NA	X	✓ No bad faith	✓	✓	X	X	NA	X	X	✓
R v T [2008] NZCA 99	2008	Drugs – Class C	✓	X	NA	NA	NA	✓ Warrant preference rule didn't apply	✓	✓	NA	NA	NA	NA	X	✓
R v Rock [2008] NZCA 81	2008	Objectionable images	✓	✓	X	NA	X	✓ significant carelessness	✓	X	X	X	X	X	✓	X

			(a) Importance of right and significance of intrusion		(b) Nature of breach				(c)	(d)	(e)	(f)	(g)	(h)	2(b)	
Case	**Year**	**Evidence in question**	**Right is important**	**Intrusion is serious**	**Deliberate**	**Reckless**	**Bad faith**	**Inadvertent mistake**	**Evidence critical to Crown case/ probative**	**Seriousness favour admissibility**	**Other investigatory techniques available**	**Alternative remedies available**	**Breach necessary to avoid danger to Police/others**	**Urgent**	**Effective & credible**	**Admissible?**
R v Yeh [2007] NZCA 580	2007	Drugs – Class A	✓	Moderate	X	X	X	✓Over zealous	✓	✓	NA	NA	NA	NA	X	✓
R v Climie [2007] NZCA 490	2007	Drugs – Class C	✓	Moderate	NA	X	X	✓ lower end	✓	✓	NA	X	NA	NA	✓	✓
R v McGaughey [2007] NZCA 411	2007	Texts	✓	Moderate	X	X	X	✓ carelessness	NA	✓	NA	NA	NA	NA	✓	✓
R v Williams [2007] NZCA 52	2007	Drugs – Class A	✓	✓	X	X	X	✓[17]exaggeration	X	✓	NA	NA	NA	✓	X	X

[17] At [130] "Good faith on the part of the police is expected".

These cases have NOT been included in the statistics for the purposes of these submissions																		
Not improperly obtained but s 30 considered in the alternative																		
			(a) Importance of right and significance of intrusion		(b) Nature of breach				(c)	(d) Max penalty			(e)	(f)	(g)	(h)	2(b)	
Case	**Year**	**Evidence in question**	**Right is important**	**Intrusion is serious**	**Deliberate**	**Reckless**	**Bad faith**	**Inadvertent mistake**	**Evidence critical to Crown case/ probative**	**< 10 years**	**14 -20 years**	**Life**	**Other investigatory techniques available**	**Alternative remedies available**	**Breach necessary to avoid danger to Police/others**	**Urgent**	**Effective & credible**	**Admissible?**
Peters v R [2023] NZCA 84	2023	Drugs	NA	NA	NA	NA	NA	✓	✓	X	X	✓	NA	NA	NA	NA	✓	✓
O'Brien v R [2022] NZCA 523	2022	Drugs	✓	x	x	x	x	✓	✓	X	X	✓	✓	X	X	X	X	✓
Ronaki v R [2023] NZCA 85	2023	Drugs	X	X	X	X	X	✓	✓	X	X	✓	X	X	X	X	X	✓
Blake v Thames District Court [2022] NZCA 557	2022	Medicines	Might be admissible only	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	X	Might be
Gorgus v R [2022] NZCA 492	2022	Item – related to offence	NA	NA	NA	NA	X	NA	✓	NA	NA	NA	NA	NA	NA	NA	X	✓
Gorgus v R [2021] NZCA 367	2021	Stolen property	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	✓
Rimene v R [2021] NZCA 42	2021	Drugs	✓	X	NA	NA	NA	NA	✓	✓ moderately	X	X	✓	X	X	X	X	✓
Erceg v R [2021] NZCA 18	2021	Drugs	✓	✓	NA	NA	NA	✓	NA	✓	X	X	✓	NA	NA	NA	X	✓
McIntyre v R [2020] NZCA 503	2020	Drugs	✓	X	NA	NA	NA	✓	NA	NA	NA	NA	NA	NA	NA	✓	X	✓
Wheki v Ministry of Social Development [2020] NZCA 493	2020	Information	✓	X	NA	NA	NA	✓ oversight	✓	✓ moderately	X	X	✓	✓	X	X	X	✓
W v R [2019] NZCA 558	2019	Item – related to offence	✓	✓	NA	NA	NA	✓ carelessness	✓	X	X	✓	✓	X	X	✓	X	✓
Roskam v R [2019] NZCA 53	2019	Stolen goods	✓	X	NA	NA	NA	✓ good faith	✓	✓ serious, property	X	X	✓	NA	NA	X	X	✓

Mehrtens v R [2018] NZCA 446	2018	Drugs	NA	NA	NA	NA	NA	✓ good faith	✓	NA	NA	NA	✓	NA	NA	✓	X	✓
Wikitera v MPI [2018] NZCA 195	2018	Texts	✓	X – narrow search	X	X	X	✓	✓	✓	X	X	NA	NA	NA	NA	X	✓
Nichols v R [2017] NZCA 562	2017	Drugs	✓	X	NA	NA	NA	✓ lack of understanding	NA	X	X	✓	NA	NA	NA	NA	NA	✓
Wild v Police [2017] NZCA 420	2017	Firearm	✓	X	NA	NA	NA	NA	✓	✓	X	X	NA	X	✓	NA	X	✓
R v Gul [2017] NZCA 317	2017	Drugs	NA	NA	NA	NA	NA	NA	✓	X	X	✓	NA	NA	NA	NA	NA	✓
Robinson v R [2017] 149	2017	Drugs	NA	NA	NA	NA	NA	NA	✓	X	X	✓	NA	✓	NA	NA	NA	✓
S (CA712/2015) v R [2016] NZCA 448	2016	Texts	✓	✓	X	X	X	Good faith	✓	X	✓ serious	X	✓	NA	NA	X	X	✓
G v R [2016] NZCA 390	2016	Name	✓	X	X	X	X	NA	✓	X	✓ moderate	X	✓	X	X	X	X	✓
Asgedom v R [2016] NZCA 334	2016	Cellphones	✓	✓	X	X	X	NA	✓	✓ serious	X	X	X	X	NA	✓	X	✓
R v Ngawhika [2016] NZCA 334	2016	Stolen goods	✓ car	NA	NA	NA	NA	NA	✓	NA	NA	NA	NA	NA	NA	NA	X	✓
Graham v R [2015] NZCA 568	2015	Electronic Images	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	✓
Maihi v R [2015] NZCA 438	2015	Drugs	✓ car, not his	X minor	X	X	X	✓ good faith	✓	X	X	✓	X	NA	X	X	NA	✓
Holdem v R [2014] NZCA 546	2014	Drugs	✓ backpack in car	X very low down	X	X	X	Minor	✓	X	X	✓	X	NA	NA	NA	✓	✓
Chadderton v R [2014] NZCA 528	2014	Breath alcohol	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	✓
Swain v R [2014] NZCA 194	2014	Drugs/cash	✓ motorbike	NA	X	X	X	✓	✓	X	X	✓ serious	X	NA	NA	X	X	✓
Ioane v R [2014] NZCA 128	2014	Stolen property	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	X	✓
Lin v R [2014] NZCA 47	2014	Drugs class B	NA	X	X	X	X	NA	✓	X	✓	X	✓	NA	NA	NA	X	✓
Dabous v R [2014] NZCA 7	2014	Drugs	NA	✓ minor	NA	NA	X	NA	✓	X	✓	X	NA	NA	NA	NA	NA	✓
Stevens v R [2013] NZCA 32	2013	Drugs	✓	X	NA	NA	X	NA	✓	X	X	✓	NA	NA	NA	NA	✓	✓
Davey v R [2012] NZCA 561	2012	Drugs	NA	NA	NA	NA	NA	✓good faith	NA	X	X	✓	NA	NA	NA	NA	NA	✓

Hall v R [2012] NZCA 283	2012	Drugs	Tenuous	Reasonable	NA	NA	NA	✓ good faith	✓	✓	X	X	X	X	X	X	✓
Lorigan v R [2012] NZCA 264	2012	Video surveillance	✓	X trivial	NA	NA	X	✓ believed acting lawfully	✓	X	X	✓	✓	X	X	X	✓	✓
McQuillan v R [2012] NZCA 120	2012	Drugs	NA	NA	NA	NA	NA	NA	NA	X	X	✓	NA	NA	NA	NA	NA	✓
Tuato v R [2011] NZCA 278	2011	Drugs and firearm	✓ car	X very low down scale	X	X	X	NA but implied	X	✓ not trivial	X	X	X	NA	NA	NA	X	✓
Dick v R [2011] NZCA 230	2011	Drugs – Class C	✓	X minor invasion	NA	NA	NA	NA	✓	✓ mod. serious	X	X	✓	NA	NA	NA	X	✓
Ibrahim v R [2011] NZCA 213[18]	2011	Drugs – class A	NA	NA	NA	NA	NA	✓ good faith	✓	X	X	✓	NA	NA	NA	NA	NA	✓
Outram v R [2010] NZCA 554	2010	Drugs – Class C	NA	NA	NA	NA	NA	X minor	NA	✓ serious	X	X	NA	NA	NA	NA	NA	✓
Dixon v R [2010] NZCA 297	2010	Drugs – class C	NA	X minor	NA	X	X	NA	✓	NA	NA	NA	NA	NA	NA	NA	NA	✓
R v Job [2009] NZCA 49	2009	Drugs – Class C	NA	NA	NA	X	X	NA	✓	✓	X	X	NA	NA	NA	NA	NA	✓
R v Petricevich [2007] NZCA 325	2007	Texts	X	X	✓	NA	X	NA	✓	✓	X	X	X	NA	NA	X	NA	✓
Gillies v R [2016] NZCA 289	2016	Drug	X low	X minimal	NA	NA	NA	NA	✓	NA	NA	NA	✓	NA	✓	NA	NA	✓

[18] Leave to appeal. Questioned whether it was established the evidence was improperly obtained. Considered within the decision.

Appendix B:[1]

General:

- 186 rulings considered which discuss s 30 in a case which deals with search and seizure at the Court of Appeal.
- 61% (114/186) found the evidence to be improperly obtained.
- 39% (72/186) found the evidence to be lawfully obtained.
- 19% (22/114) found the improperly obtained evidence inadmissible.
- 81% (92/114) found the improperly obtained evidence admissible.

Section 30(3)(a) Importance of the right breached and seriousness of intrusion:

Importance of the right:

- 89% (102/114) found that the right involved was important.
- 9% (10/114) found the right involved was of less importance.
- <2% (2/114) did not discuss the importance of the right.

Significance of the intrusion:

- 39% (44/114) found that the intrusion on the right was high.
- 12% (14/114) found that the intrusion on the right was moderate.
- 46% (53/114) found that the intrusion on the right was low.
- 3% (3/114) did not discuss the intrusion on the right.
- Where the intrusion was found to be moderate to high 66% (38/58) rulings held the evidence was admissible.

[1] These statistics have been calculated using the information from the table of cases in Appendix A. The statistics deal with Court of Appeal cases which cite s 30 of the Evidence Act 2006 in relation to a search or seizure.

Section 30(3)(b) Nature of the impropriety:

- The nature of the impropriety was found to be more technical (good faith, careless) or no impropriety in 97 rulings.
- The nature of the impropriety was found to be deliberate, reckless or in bad faith in 17 rulings.
    - 65% (11/17) found the impropriety to be deliberate.
    - 24% (4/17) found the impropriety to be reckless.
    - 12% (2/17) found the impropriety to be in bad faith.
- 10% (11/114) of all rulings which found that evidence is improperly obtained found the nature of the impropriety was deliberate.
    - 4% (4/114) found the nature of the impropriety was reckless.
    - <2% (2/114) found the nature of the impropriety was in bad faith.
- When the nature of the impropriety was found to be more technical (good faith, carelessness etc.) the evidence was ruled inadmissible 14% (14/97) of the time.
- Where the impropriety was more technical the evidence was ruled admissible 86% (83/97) of the time.
- Where the nature of the impropriety was found to be deliberate, reckless or in bad faith the evidence was ruled inadmissible 29% (5/17) of the time.
- Where the nature of the impropriety has been found to be deliberate, reckless or in bad faith the evidence was ruled admissible 71% (12/17) of the time.

Section 30(3)(c) Nature and quality of the evidence:

- 85% (97/114) found the improperly obtained evidence to be of probative value and critical to the Crown case.[2]
- 11% (12/114) did not discuss this factor.

[2] The critical nature of the evidence to the Crown case is included here because it is often considered by the Court in the nature and quality of the evidence factor.

- 4% (5/114) found the evidence was not probative/critical to the Crown case.
- 29% (5/17) of rulings that do not discuss the factor or find the evidence was not probative found the evidence inadmissible
- 71% (12/17) of these found the evidence admissible
- 80% (4/5) of rulings which found the evidence is not to be probative or critical to the Crown case found the evidence is inadmissible.
- 82% (80/97) of rulings which found the evidence to be probative/critical to the Crown case, the evidence was found to be admissible.
- 18% (17/97) of these were found the evidence to be inadmissible.

Section 30(3)(d) Seriousness of the offence:

- 79% (90/114) considered the seriousness of the offence as a factor favouring admission.
- 11% (13/114) did not consider the seriousness of the offence as a factor favouring admis sion.
- 10% (11/114) did not consider this factor.
- Of those that considered seriousness as a factor favouring admission 13% (12/90) found the evidence to be inadmissible.
- 87% (78/90) ruled the evidence admissible.

Section 30(2)(b) Take proper account of the effective and credible system of justice:

- 48% (55/114) mentioned the effective and credible system of justice:
    - 25% (14/55) just state the law. E.g. copy paste from the Act, or reference to the Act.
    - 29% (16/55 (29%) give the factor a brief discussion (brief being one or two short sentences)
    - 45% (25/55) appear to give the factor weight or substantive discussion.
        - Where the factor was given substantive discussion, the evidence was ruled inadmissible 36% (9/25) of the time.

        - Compared to the overall percentage of where effective and credible is discussed in any capacity the evidence is ruled inadmissible in 22% (12/55) of rulings.

    - 73% (40/55) of the rulings which mention the effective and credible system addressed it in a case specific way.

        - 60% (33/55) found the evidence to be admissible.

    - 27% (15/55) of the rulings which mentioned the effective and credible system discuss it in a way which address the police considerations of the long-term interests of the justice system.

        - 47% (7/15) found the evidence inadmissible.

        - 53% (8/15) found the evidence admissible.

- Broader public policy considerations of long-term interests of an effective and credible justice system are only discussed in 13% (15/144) of all rulings.

- Broader public policy considerations of long-term interests of an effective and credible justice system are only discussed in 60% (15/25) of rulings which give the factor substantive discussion.