IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC 51/2023**

BETWEEN	**MAHIA TAMIEFUNA**
	Appellant
AND	**THE KING**
	Respondent

RESPONDENT'S SUBMISSIONS ON CONVICTION APPEAL

20 February 2024

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COUNSEL FOR THE RESPONDENT CERTIFIES THAT THIS SUBMISSION
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Issue

1. In the early hours of the morning, while impounding an unlicensed driver's car, a police officer noticed items that appeared to have been stolen. Given the men in the car would not say where they had come from and all three had convictions for serious and property-related offending, the officer decided to record this event in an intelligence noting. He supplemented that noting with a photograph he took of the appellant, Mahia Tamiefuna, standing on the footpath.

2. Within three weeks, that photograph allowed the police to identify Mr Tamiefuna as one of the offenders in a recent home invasion robbery. After twice unsuccessfully challenging the admissibility of that photograph, Mr Tamiefuna was convicted of aggravated robbery and sentenced to imprisonment.

3. On appeal, the Court of Appeal held the photograph had been obtained via an unreasonable search contrary to s 21 of the New Zealand Bill of Rights Act 1990 (**NZBORA**). However, it considered that exclusion of the evidence would not be a proportionate response to the impropriety and upheld Mr Tamiefuna's conviction.

4. Two principal questions arise on appeal:

    4.1 Was the Court of Appeal correct to find that the photograph was improperly obtained?

    4.2 If so, was the Court correct to rule the evidence admissible under s 30 of the Evidence Act 2006?

Summary of argument

5. The photograph of Mr Tamiefuna was not improperly obtained. It was taken to assist the police in performing their duty to detect crimes. At common law, the police are empowered to collect intelligence, including via photography, for that purpose. This basic power has not been excluded by statute. The officer's actions were accordingly lawful.

6. There was also no breach of s 21. A photograph taken, overtly and without objection, of a person on a public footpath does not invade any reasonable

expectation of privacy. There was therefore no search – and certainly no *unreasonable* search.

7. Even if the evidence were improperly obtained, its exclusion would have been disproportionate to any impropriety: there was, at most, a minimal intrusion on Mr Tamiefuna's privacy; the evidence obtained was real, reliable, and central to the Crown case; and the offending is serious. Excluding such evidence in these circumstances would undermine the need for an effective and credible justice system.

Facts

8. On 5 November 2019, Detective Sergeant Bunting and Detective Constable Harrison were on night shift, patrolling the Rānui area in West Auckland. Very few other vehicles were on the road. At about 4:20 am, the officers carried out a routine stop of a blue Ford Falcon to conduct driver licensing and breath alcohol checks.[1]

9. DC Harrison dealt with the driver of the vehicle. Meanwhile, DS Bunting spoke with the passengers, including Mr Tamiefuna.[2] He asked for the men's names and dates of birth and made general conversation.[3] The driver explained that Mr Tamiefuna had asked him for a ride from a nearby address to his home in Avondale. But the men declined to provide that address.[4]

10. DS Bunting returned to his vehicle and verified the men's details on the police National Intelligence Application (**NIA**).[5] Because the driver was forbidden from driving, a decision was made to impound the Ford. A tow truck was called, and the occupants were asked to get out of the car.[6] They did so and began removing some of the property inside.[7]

11. While this was occurring, DS Bunting noticed items in the vehicle that he suspected might have been stolen: a woman's handbag and jacket (despite

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1 CA COA (Evidence) at 9, 10 and 13; CA COA (Exhibits) at 51 (evidence before Davison J); SC COA at 152–153 (evidence before Moore J).
2 CA COA (Exhibits) at 51 (evidence before Davison J); SC COA at 153 (evidence before Moore J).
3 CA COA (Evidence) at 10.
4 CA COA (Evidence) at 28.
5 CA COA (Evidence) at 10.
6 CA COA (Exhibits) at 52; CA COA (Evidence) at 6.
7 CA COA (Exhibits) at 52; CA COA (Evidence) at 11, SC COA at 157.

there being no women in the car);[8] and four car batteries (items commonly stolen for use as scrap).[9] The officer also consulted NIA, which showed:

11.1 All three men had recent convictions for property and other serious offending;[10] and

11.2 Mr Tamiefuna had recently been released from prison and was subject to release conditions.[11]

12. Due to this combination of circumstances, DS Bunting decided to record the events in an "intelligence noting".[12] He did so because he suspected that some of the property in the vehicle may have been stolen.[13] While he was not at that point "investigating a particular offence", he wished to record "that the three people were associates…, that they were linked to that vehicle in that area at that time, that they had this particular property with them at that time."[14] The noting would then be "available to other officers in the future to assist with policing activities".[15]

13. To accompany the noting, the officer took photographs, including one of Mr Tamiefuna, on his mobile phone.[16] The photo of Mr Tamiefuna was taken overtly, and shows him standing on the footpath next to the vehicle, looking directly at the camera.[17]

14. Within a matter of weeks, the intelligence noting and the photograph connected Mr Tamiefuna to an aggravated robbery of a nearby home three days before the traffic stop:[18] the noting linked him to the blue Ford Falcon, which was connected to the robbery; and his appearance and clothing that night closely resembled CCTV footage of one of the offenders.

15. As to the suspicious property in the car, DS Bunting said that DC Harrison

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8 When DS Bunting asked where the handbag had come from, Mr Tamiefuna said it belonged to his sister: CA COA (Evidence) at 27–28.
9 CA COA (Evidence) at 14 and 21.
10 CA COA (Evidence) at 13 – 14 and 26.
11 At 11.
12 CA COA (Evidence) at 12 – 15; the noting itself is at CA COA (Exhibits) at 54–57.
13 CA COA (Evidence) at 13.
14 At 16.
15 At 15.
16 CA COA (Evidence) at 12.
17 A copy of the photograph is included at CA COA (Exhibits) at 41.
18 Mr Tamiefuna was arrested for this offence on 25 November 2019, 20 days after the roadside stop: Statement of Agreed Facts at [19], CA COA at 29.

would have been responsible for following up, but he did not know whether she did so.[19]

High Court judgments

16. Mr Tamiefuna unsuccessfully challenged the admissibility of the photograph, both before[20] and during[21] his trial for aggravated robbery.

17. Moore J ruled the evidence admissible prior to trial. His Honour considered the challenge to be "misconceived".[22] He held that Mr Tamiefuna did not have an objectively reasonable expectation of privacy while standing "in the open public space of a roadside footpath".[23] The taking of the photograph was "unremarkable, if not entirely predictable".[24] Accordingly there was no breach of s 21 and the officer's actions were lawful.[25] Moreover, even if the photograph had been improperly obtained, its exclusion would have been disproportionate to any impropriety.

18. After the Court of Appeal declined Mr Tamiefuna's application for leave to appeal,[26] Mr Tamiefuna indicated that if the photograph were admissible, he would admit the aggravated robbery. However, to maintain his admissibility objection, he withdrew his jury-trial election, obtained severance and went to a Judge-alone trial before Paul Davison J.[27]

19. At that trial, only DS Bunting gave evidence; all other material facts were agreed.[28]

20. Paul Davison J ruled the photograph admissible and found Mr Tamiefuna guilty. As to admissibility, his Honour held:

    20.1 The initial traffic stop was lawful and consistent with the functions of the police, particularly law enforcement and crime prevention.[29]

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19 CA COA (Evidence) at 14.
20 *R v Tamiefuna* [2020] NZHC 163 at [109]-[136], SC COA at 143-150.
21 *R v Tamiefuna* [2021] NZHC 1969, CA COA at 71.
22 SC COA at 147 (at [125]).
23 At 148 (at [129]).
24 At 149 (at [131]).
25 At 148 – 149 (at [128] – [129]).
26 *Te Pou v R* [2021] NZCA 263 at [76]-[84], SC COA at 69–70.
27 CA COA at 67–70.
28 CA COA at 27–29.
29 CA COA at 85 (at [43]).

20.2 The decisions to make an intelligence noting and take photographs were made after Mr Tamiefuna had exited the vehicle.[30]

20.3 While DS Bunting held suspicions about some of the property in the car, his actions were for intelligence (rather than evidence gathering) purposes, namely, recording information "against the possibility that it might be relevant to and of assistance to future police enquiries regarding the defendant or his associates".[31]

20.4 The photography did not constitute a search: Mr Tamiefuna was "very clearly in a public place", there was "no element of concealment or secrecy", he could not "have considered himself to be in a private setting or situation", and the images showed only what could be seen by the naked eye.[32]

20.5 Even if there were a search, it would not have been unreasonable, given it "was only a minimal intrusion" into Mr Tamiefuna's privacy and he had cooperated by looking directly at the camera.[33]

20.6 Further, even if the evidence were improperly obtained, it would not have been excluded: any impropriety was minimal, the evidence was crucial and its accuracy could not be challenged.[34]

Court of Appeal judgment[35]

21. Disagreeing with the High Court Judges, the Court of Appeal held there had been a breach of s 21 of the NZBORA:

21.1 Photographing Mr Tamiefuna constituted a search: where a state agent photographs an individual for identification purposes, "there is a reasonable expectation that will not occur in a public place without a good law enforcement reason".[36]

21.2 The taking and retention of Mr Tamiefuna's photograph "was not

30 CA COA at 85 (at [45]).
31 At 87 (at [50]).
32 At 85 – 87 (at [45] – [51]).
33 At 87 (at [52]).
34 At 88 (at [53] – [55]).
35 *Tamiefuna v R* [2023] NZCA 163, SC COA at 9 – 48.
36 At 27 (at [57]).

lawful because it was not authorised by statute".[37]

21.3 Nor did the common law authorise the officer's conduct. Although "the police have authority to investigate crime and carry out actions that are reasonably incidental to that purpose",[38] the officer who photographed Mr Tamiefuna had not been gathering evidence of alleged offending by him[39] and the suspicious circumstances had not resulted in any police investigation.[40]

21.4 The search was unreasonable,[41] having breached three privacy principles.[42]

22. However, the Court held the evidence was properly admitted under s 30: exclusion would be disproportionate given the intrusion was not very serious, the breach inadvertent, the evidence real and important, and the offending serious.[43] It accordingly dismissed the conviction appeal.[44]

RESPONDENT'S SUBMISSIONS ON CONVICTION APPEAL

23. The Crown submits the appeal should be dismissed for two reasons:

23.1 The Court of Appeal was wrong to find the photograph improperly obtained. The officer had the power at common law to make a record, including taking photographs, of his interaction with Mr Tamiefuna for the purpose of detecting possible crimes. And, in so doing, he did not conduct a search contrary to s 21: an overt photograph of a person on a public footpath for genuine police purposes does not invade any reasonable expectation of privacy.

23.2 Even if the evidence were improperly obtained, its exclusion would have been manifestly disproportionate to the impropriety, as all five Judges to consider the question have held.

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37 SC COA at 41 (at [97]). See also at 31 (at [70]): police conduct "lacked legal authorisation".
38 At 33 (at [74]).
39 At 33 (at [74]). See also at 31 (at [70]): it was "decisive" that here, "no attempt was made to show the photographs were taken or retained in the context of an ongoing police inquiry or for any other lawful purpose. Different considerations would apply if there were such an inquiry, and subsequent prosecution."
40 At 31 (at [70]); see also at 33 (at [74]) and at 39 (at [91]).
41 At 31 (at [70]) and at 41 (at [97]).
42 At 35-36 (at [80]-[83]).
43 At 42-43 (at [100]–[102]).
44 At 41-43 (at [98]-[104]).

Lawfulness

24. As will be familiar, s 30(5)(a) of the Evidence Act provides that evidence is improperly obtained if it is obtained "in consequence of a breach of any enactment or rule of law". The Court of Appeal found that criterion satisfied on the basis that the photograph of Mr Tamiefuna was not authorised by statute and had breached s 21.[45] Central to that conclusion was the Court's view that the officer did not have "a good law enforcement reason"[46] or "any… lawful purpose"[47] for taking Mr Tamiefuna's photograph. Indeed, the Court considered the officer's actions involved "[t]he random use of photography".[48]

25. The Crown submits the Court was wrong to view the officer's actions in this way.

The purpose for which the photograph was taken

26. In the High Court, DS Bunting explained that he decided to make the intelligence noting and take Mr Tamiefuna's photograph because he suspected "that some of the property in the vehicle may have been stolen property".[49] He had a good basis to do so, because:

    26.1 Mr Tamiefuna had recent criminal convictions and was subject to release conditions;[50]

    26.2 The other two men in the vehicle also had recent convictions for property and other serious offending;[51]

    26.3 The time of the morning;[52]

    26.4 The men's explanation as to where they had come from and what they were doing;[53] and

    26.5 The nature of certain items in the car, which either did not belong to the men (the woman's handbag and jacket) or are commonly

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45 SC COA at 41 (at [99]).
46 At 27 (at [57]).
47 At 31 (at [70]); see also at 35 (at [80]).
48 At 42 (at [100]).
49 COA (Evidence) at 13.
50 COA (Evidence) at 26.
51 COA (Evidence) at 13 and 26.
52 COA (Evidence) at 13.
53 COA (Evidence) at 13.

targeted by thieves and were present in an unusual quantity (the four car batteries).[54]

27. The officer explained that the noting was "intelligence" rather than evidence of a particular offence:[55]

> At that point intelligence is something which is not evidence. That's my view. So if I was investigating a particular offence, I'll be collecting evidence in relation to the [offence]. In this case there was no particular offence that I was investigating and so it was intelligence in terms of that the three people were associates associated to each other, that they were linked to that vehicle in that area at that time, that they had this particular property with them at that time.

28. However, while he did not suspect Mr Tamiefuna of committing a "particular" offence,[56] he anticipated the information "could be used as evidential material in a subsequent criminal proceeding".[57]

29. The Court of Appeal was accordingly wrong to characterise the officer's actions as "random" and not undertaken for a legitimate police purpose. To the contrary, DS Bunting suspected *particular people* (the occupants of the car) of possible involvement in a *particular type of offending* (theft) in relation to *particular items* (the handbag and car batteries). He believed the information would assist the police in detecting, and possibly prosecuting, criminal offending.

30. For the reasons that follow, this was a legitimate police purpose for which the common law authorises the collection of intelligence, including by photography.

The common law authorises police to gather intelligence, including by photography

The common law duties and powers of the police

31. The office of constable is a creature of the common law.[58] Police officers in New Zealand possess common law powers correlating with their

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54 COA (Evidence) at 14 and 21.
55 COA (Evidence) at 16.
56 COA (Evidence) at 16.
57 COA (Evidence) at 16.
58 *R (Bridges) v Chief Constable of South Wales Police (Information Comr intervening)* [2019] EWHC 2341 (Admin), [2020] 1 WLR 672 at [69] (*"Bridges (HC)"*): **Respondent's bundle of authorities (RBOA) tab 18**; *Halsbury's Laws of England*, 5th ed (2019), vol 84 (Police and Investigatory Powers), at [1]. For a discussion of the history of the office of constable at common law, see *New South Wales v Tyszyk* [2008] NSWCA 107 at [55]–[72] and *Redbridge London Borough Council v Dhinsa* [2014] EWCA Civ 178, [2014] ICR 834 at [38]–[51].

"extensive" common law duties.[59] While those duties are usually expressed in general terms, at their core they include "an absolute and unconditional obligation… to take all steps which appear to them to be necessary for keeping the peace, for preventing crime or for protecting property from criminal injury".[60] This core necessarily includes the "duty to detect crime and to bring an offender to justice",[61] which are objectives "of the first order of importance" in a democratic society.[62]

32. Given the broad scope of these duties, courts have recognised a variety of common law police powers. Many involve some intrusion on the subject's liberty or property. As Diplock LJ noted in *Chic Fashions*:[63]

> [T]here are throughout the country regular police forces whose officers are charged with the duty of preventing and detecting crime. The common law has always recognised that the discharge of this duty may justify some interference with rights of innocent private citizens which would in other circumstances be entitled to its protection.

The Canadian Supreme Court has similarly observed that, "[g]iven their mandate to investigate crime and keep the peace, police officers must be empowered to respond quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines of policing."[64]

33. The common law has thus recognised, for example: in Canada, the power to search incidental to arrest,[65] to enter a dwelling by force to protect life and safety,[66] to detain a person for investigative purposes and to search

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59 *R v Ngan* [2007] NZSC 105, [2008] 2 NZLR 48 ("*Ngan*") at [11] per Blanchard J ("Subject of course to express statutory modification, the common law duties of a constable and the powers necessarily incident to their discharge attach to members of the police in New Zealand"), citing *Minto v McKay* [1987] 1 NZLR 374 (CA) (Cooke P holding that it "would scarcely be seriously arguable" that the common law powers and duties of a constable do not attach to police in New Zealand): **RBOA tab 10.**

60 *Ngan*, *ibid* at [12], **RBOA tab 10,** citing *Glasbrook Bros Ltd v Glamorgan CC* [1925] AC 270 at 277 per Viscount Cave LC. Reflecting the common law duties, section 9 of New Zealand's Policing Act 2008 lists "law enforcement" and "crime prevention" as among the police's functions.

61 *Rice v Connolly* [1966] 2 QB 414 at 419: **RBOA tab 23**. See also *Ngan,* above n 59, at [77] per McGrath J: **RBOA tab 10**, and *Gaughran v Chief Constable of the Police Service of Northern Ireland* [2015] UKSC 29, [2016] AC 345 at [26] and [58]: **RBOA tab 15**. Section 9(c) and (d) of the Policing Act 2008 similarly recognises that the functions of the include "law enforcement" and "crime prevention". Sir Robert Peel's first instructions to the newly established Metropolitan Police also made this clear: "It should be understood at the outset, that the object to be attained is the prevention of crime. To this great end every effort of the police is to be directed. The security of person and property and the preservation of a police establishment will thus be better effected than by the detection and punishment of the offender…" (TA Critchley *A History of Police in England and Wales* (Rev ed, Constable and Company, London, 1978) at 52).

62 *In re JR38* [2015] UKSC 42, [2016] AC 1131 at [73]: **RBOA tab 16**.

63 *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 WLR 201 at 212 ("*Chic Fashions"*).

64 *Mann v R* [2004] 3 SCR 59 ("*Mann"*) at 69 per Iacobucci, Major, Binnie, LeBel and Fish JJ.

65 *R v Caslake* [1998] 1 SCR 51.

66 *R v Godoy* [1999] 1 SCR 311 (forced entry to an apartment when investigating a 911 call).

such a person for protective purposes;[67] in the United Kingdom, the power to seize property not specified in a search warrant but reasonably believed to be stolen,[68] to stop a vehicle and detain it to effect an arrest,[69] to search a person and their home when executing an arrest warrant, [70] and to detain a person to prevent a breach of the peace;[71] and in New Zealand, the power to take and detain chattels temporarily to prevent a breach of the peace,[72] to search a person incidental to arrest,[73] to collect and inventory property at the scene of an accident,[74] and to stop and search a vehicle in emergency circumstances.[75]

Intelligence-gathering is necessary to carry out police duties

34. It is also clear that, to fulfil their duties, the police must gather (and use) information or intelligence.[76] Indeed, as the Royal Commission recently observed, the police's "ability to collect and analyse information about risks in and against communities is critical to the prevention of crime".[77] McHugh J also emphasised this fact in *Tame v New South Wales*:[78]

> Gathering and recording intelligence concerning the activities, potential activities and character of members of the criminal class is also central to the efficient functioning of a modern police force. Recording hearsay, opinions, gossip, suspicions and speculations as well as incontestable factual material is a vital aspect of police intelligence gathering.

35. Intelligence-gathering occurs in many forms. At one end of the spectrum are informal inquiries of people in public places while "on the beat", as part

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67 *Mann*, above n 64. As to the United States, see *Terry v Ohio* 392 US 1 (1968), **ABOA tab 17,** and *Adams v Williams* 407 US 143 (1972) at 5–6: "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. … A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."

68 *Chic Fashions*, above n 63.

69 *Lodwick v Sanders* [1985] 1 WLR 382 (QBD) at 390.

70 *Regina (Rottman) v Commissioner of Police of the Metropolis* [2002] UKHL 20, [2002] 2 AC 692.

71 *Albert v Lavin* [1982] AC 546 (HL).

72 *Minto v Police* [1987] 1 NZLR 374 (CA).

73 *R v Noble* [2006] 3 NZLR 551 (HC).

74 *Ngan,* above n 59, **RBOA tab 10**.

75 *Smith v R* [2022] NZCA 660, **RBOA tab 12**.

76 *R v Alsford* [2017] NZSC 710, [2017] 1 NZLR 710, **Appellant's bundle of authorities (ABOA) tab 7,** at [88]: "the police have a legitimate intelligence-gathering function, and obtain information from a wide variety of sources of varying reliability and importance." See also *Bridges (HC),* above n 58 at [69]: **RBOA tab 18**; *Steele v Kingsbeer* [1957] NZLR 552 (SC) at 554: "when a police officer suspects that a crime has been committed, it is his duty as well as his right to endeavour to elicit information from any person or persons likely to be able to supply such information"; and *Halsbury's Laws of England,* 5th ed, Vol 84 (2019) at [40]: "it is the duty of the police to obtain all possible information regarding criminal offences which have been committed".

77 *Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019,* 6 November 2020 (vol 3) at 483 (emphasis added, footnote omitted).

78 *Tame v New South Wales* [2002] HCA 35, (2002) 211 CLR 317 at [125].

of the "historical role as 'conservator of the peace'"[79] or while investigating suspicious behaviour.[80] Inquiries of that sort may, as Robert Goff LJ held in *Collins v Wilcock*, involve a degree of persistence – and even limited physical contact.[81]

36. But it also extends to the systematic collection and retention of information for future police purposes.[82] In *Catt*, for example, Lord Sumption endorsed the gathering of intelligence on protest groups over many years as having been done for a range of "proper policing purposes": assessing risks to public order associated with the demonstrations; determining the nature and scale of any police response in future; and studying certain protest groups.[83]

37. This Court in *R v Alsford*[84] held that the police may retain and use even improperly obtained information, noting that intelligence "may prove to be vital in enabling the police to resolve subsequent serious offending".[85] And, in *Lorigan*, the Police video surveillance operation in issue cross-referenced its results with information on the police's "intelligence databases".[86]

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79 *Kearns v R* [2017] 2 NZLR 835 (CA) at [17] – [19].

80 See *Terry v Ohio,* above n 67 at 22: "One general [governmental] interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. … It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate [the appellant's] behavior further." **ABOA tab 17.** See also *Brown v Regional Municipality of Durham* (1998) 167 DLR (4th) 672 (ONCA) at [31]: "the gathering of police intelligence is well within the ongoing police duty to investigate criminal activity".

81 *Collins v Wilcock* [1984] 1 WLR 1172 (DC) at 1178: "A police officer may wish to engage a man's attention, for example if he wishes to question him. If he lays his hand on the man's sleeve or taps his shoulder for that purpose, he commits no wrong. He may even do so more than once; for he is under a duty to prevent and investigate crime, and so his seeking further, in the exercise of that duty, to engage a man's attention in order to speak to him may in the circumstances be regarded as acceptable…."

82 *R (on the application of Catt) v Association of Chief Police Officers and another; R (on the application of T) v Metropolitan Police Comr* [2015] UKSC 9, [2015] AC 1065 ("*Catt (SC)*") at [7]: **RBOA tab 21**; *Catt v United Kingdom (App. No. 43514/15)* [2019] ECHR 43514/15 (*"Catt (ECHR)"*) at 34 (approving the SC decision on this point): **RBOA tab 24**.
As to common law powers of retention, see also *Ngan,* above n 59 at [47] per Tipping J, **RBOA tab 10**, citing *R v Waterfield* [1964] 1 QB 164, 170 – 171: **RBOA tab 22**, in turn citing *R v Lushington*, *ex p Otto* [1894] 1 QB 420, 42: "In this country I take it that it is undoubted law that it is within the power of, and is the duty of, constables to retain for use in Court things which may be evidences of crime, and which have come into the possession of the constables without wrong on their part." See also *Anderson v Sills* 56 NJ 210 (1970) (NJSC) at 226–229: "Here we are dealing with the critical power of government to gather intelligence to enable it to satisfy the very reason for its being -- to protect the individual in his person and things. … [T]he preventive role of the police necessarily implies a duty to gather data along a still wider range [than a grand jury]. … The basic approach must be that the executive branch may gather whatever information it reasonably believes to be necessary to enable it to perform the police roles, detectional and preventive. A court should not interfere in the absence of proof of bad faith or arbitrariness."

83 *Catt (SC),* above n 82 at [29]: **RBOA tab 21**.

84 *Alsford,* above n 76 at [88] (the police have a "legitimate intelligence-gathering function") and [95] (evidence previously ruled inadmissible fell in the category of "general intelligence which the police are entitled to collate over time and to rely on if necessary"): **ABOA tab 7**. The majority noted that if there was any indication that police were systematically breaching rights to obtain it, the analysis would be quite different.

85 *Alsford*, above n 76 at [88]: **ABOA tab 7**.

86 *Lorigan v R* [2012] NZCA 264, (2012) 25 CRNZ 729 ("*Lorigan (CA)*") at [10]: **RBOA tab 5**.

38. It is important also to emphasise that while intelligence may ultimately prove to be relevant to a particular crime or investigation, this will not often be known at the time it is collected. As Lord Sumption explained in *Catt*:[87]

> Most intelligence is necessarily acquired in the first instance indiscriminately. Its value can only be judged in hindsight, as subsequent analysis for particular purposes discloses a relevant pattern. The picture which is thus formed is in the nature of things a developing one, and there is not always a particular point of time at which one can say that any one piece in the jigsaw is irrelevant.

39. It follows that whether or not a criminal investigation is later opened in relation to any particular piece of information – which will depend on what other information becomes available – cannot, as the Court of Appeal appeared to hold,[88] undermine the legitimacy of the recording of the information in the first place.

The common law power to gather intelligence includes photography

40. As will be apparent, most consideration of police common law powers has involved actions that prima facie interfere with citizens' liberty or property.[89] In that context, courts often determine whether the power was lawfully exercised by asking whether the officer was acting pursuant to a duty, and, if so, whether the conduct "involved an unjustifiable use of powers associated with the duty".[90]

41. By contrast, photographing a person in a public place does not (absent circumstances such as detention or trespass) interfere with a person's liberty or property.[91] It is perhaps for that reason that, when the question has arisen, courts have had little difficulty holding that the police have the power to take photographs of individuals in public places, including for

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87 *Catt (SC),* above n 82 at [31]: **RBOA tab 21**.

88 SC COA at 36 (at [82]) and 39 (at [91]).

89 In other contexts police officers' common law powers may permit them to act in a way that would usually be unlawful: *Police v Amos* [1977] 2 NZLR 564, 569 per Speight J ("circumstances may arise where there is a common law duty on a policeman to take steps which would otherwise be unlawful if he has apprehension on reasonable grounds of danger to life or property, but the limits to which he may go will be measured in relation to the degree of seriousness and the magnitude of the consequences apprehended"), cited with approval by McGrath J in *Ngan*, above n 59 at [82], **RBOA tab 10**.

90 *Ngan,* above n 59 at [14] ("any interference with private liberty or property by the police is unlawful unless it can be justified either 'by the text of the statute law, or by the principles of common law'"), **RBOA tab 10,** citing *Entick v Carrington* (1765) 19 St Tr 1030; (1765) 95 ER 807, 817–18, Lord Camden holding that the state could not, without positive lawful authority, invade the privacy of a person's property or papers; *R v Waterfield,* above n 82 at 171 per Ashworth J ("while it is no doubt right to say in general terms that police constables have a duty to prevent crime and a duty, when crime is committed, to bring the offender to justice, it is also clear from the decided cases that when the execution of these general duties involves interference with the person or property of a private person, the powers of constables are not unlimited"): **RBOA tab 22**.

91 *Hosking v Runting* [2005] 1 NZLR 1 (CA), **RBOA tab 4**; *Murray v United Kingdom (Application 14310/88)* [1994] ECHR 14310/88 ("*Murray*") at [40] and [88]: **RBOA tab 25**.

intelligence purposes.

42. Three decisions in England and Wales have recently considered the question.

43. *R (Wood) v Commissioner of Police of the Metropolis*[92] concerned photographs taken by the police of a man leaving an annual general meeting. While a majority found a breach of art 8 of the European Convention on Human Rights (**Convention**), the Court of Appeal nevertheless confirmed that the police had acted pursuant to a common law power in taking the photographs in question.[93] The Court was, moreover, unanimous that the police had been acting in pursuit of a legitimate aim (notwithstanding that, as here, they were not investigating particular offences): the photos were to assist them to identify offenders if it transpired that offences had been committed inside the meeting and to assist them in identifying persons "who might possibly commit public order offences" at a forthcoming trade industry fair.[94]

44. The Supreme Court's decision in *R (on the application of Catt) v Association of Chief Police Officers* is to similar effect.[95] At issue was the police making (including by taking photographs) and retaining records relating to a political protest group. The group's protests had previously resulted in violence or the destruction of property, but there was nothing to suggest Mr Catt, aged 91 and without previous convictions, had been involved in any criminality. The Court held there had been no breach of art 8. In so doing, it confirmed that it was lawful for the police to gather "public information" in this way:[96]

> At common law the police have the power to obtain and store information for policing purposes, i.e., broadly speaking for the maintenance of public order and the prevention and detection of crime. These powers do not authorise intrusive methods of obtaining information, such as entry on private property or acts (other than arrest under common law powers) which would constitute an assault. But they were amply sufficient to authorise the obtaining and

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92 *R (Wood) v Commissioner of Police of the Metropolis* [2009] EWCA Civ 414, [2010] 1 WLR 123 ("*Wood*"), **ABOA tab 23**.

93 At [53]–[55] (per Laws LJ) and [98] (per Lord Collins of Mapesbury).

94 At [48] (per Laws LJ), at [79] (per Dyson LJ) and at [96]–[97] (per Lord Collins).

95 *Catt (SC),* above n 82: **RBOA tab 21**.

96 *Catt (SC),* above n 82 at [7]: **RBOA tab 21**. *See also Catt (ECHR),* above n 82 at [34] ("At common law the police have the power to obtain and store information for policing purposes including for the maintenance of public order and the prevention and detection of crime"): **RBOA tab 24**.

storage of the kind of public information in question on these appeals.

45. The Court further held that retention of such information was lawful, to "assist the prevention and detection of crime".[97] As Lady Hale explained, this reflected "the crucial role which piecing together different items of police intelligence can play in preventing as well as detecting crime".[98]

46. *R (Bridges) v Chief Constable of South Wales Police (Information Comr intervening)*[99] concerned a challenge to the police use of CCTV cameras equipped with automatic facial recognition capabilities, deployed to identify the presence of people on "watch lists" at large public events. The Divisional Court held that the police's common law powers were "amply sufficient" in relation to the use of the technology, relying on *Wood* and *Catt*.[100] While the Court of Appeal allowed the appeal on other grounds, it nevertheless confirmed that the police "undoubtedly" have the power to record what they see in a public place, including by photographing people, and to retain that information in their files.[101]

47. When the issue has arisen in Australia[102] and Canada, it has similarly been accepted that police may lawfully take photographs of people in public:

    47.1 In *R v Shortreed*, the Ontario Court of Appeal held that, provided no physical compulsion was involved, the police were not required to obtain a suspect's consent before taking a photograph of him in a public place;[103]

    47.2 In *Brown v Regional Municipality of Durham*, the Ontario Court of Appeal confirmed it was lawful and proper for the police to video

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97 *Catt (SC),* above n 82 at [30]: **RBOA tab 21.**

98 At [48]. The European Court of Human Rights also agreed that the creation and maintenance of an "extremism database" pursued the legitimate aim of preventing "disorder or crime and safeguarding the rights and freedoms of others": *Catt (ECHR),* above n 82 at [108]: **RBOA tab 24**.

99 *Bridges (HC),* above n 58: **RBOA tab 18**.

100 *Bridges (HC)*, *ibid* at [78]: **RBOA tab 18**, citing *Catt (SC)*, above n 82 at [7]: **RBOA tab 21**. See also *Bridges (HC)* at [73] ("[T]he extent of the police's common law powers has generally been expressed in very broad terms. The police did not need statutory powers, e.g., to use CCTV or use body-worn video or traffic or ANPR [automatic number-plate recognition] cameras, precisely because these powers were always available to them at common law. Specific statutory powers were needed for e.g., the taking of fingerprints, and DNA swabs to obviate what would otherwise be an assault."): **RBOA tab 18**.

101 *R (Bridges) v Chief Constable of South Wales Police (Information Commissioner and others intervening)* [2020] EWCA Civ 1058, [2020] 1 WLR 5037 ("*Bridges (CA)"*) at [84]: **RBOA tab 19**.

102 See *Slaveski v State of Victoria* [2010] VSC 441, where the Court noted that "It was not contended in this case that there was anything unlawful about the taking of video footage or photographs [by police] from a public place": at [1362]; and *Caripis v Victoria Police (Health and Privacy)* [2012] VCAT 1472, where the Tribunal found the Police were entitled to retain, "as 'potentially useful intelligence'", approximately 200 minutes of video footage taken of a peaceful protest: at [27] and [33].

103 *R v Shortreed* (1990) 54 CCC (3d) 292, 75 CR (3d) 306 (Ont CA).

gang members and associates during traffic stops for intelligence purposes;[104] and

47.3 In *R v Abbey*, the Ontario Superior Court of Justice held that the police were entitled to photograph the front of an individual's t-shirt for information-gathering purposes during a traffic stop, despite not suspecting him of any criminal offending.[105]

48. New Zealand courts, too, have consistently held that it is lawful for police to undertake video surveillance of a place that is visible to the public, provided they do not trespass.[106] The Court of Appeal distinguished these authorities (which are discussed in detail below) on the basis that they involved the police investigating suspected crimes, rather than gathering intelligence.[107] But, as discussed above, this reflects too narrow a conception of the duties of the police, which must extend to *detecting* crime, not merely investigating crimes that have been reported.

49. Finally, it is also settled that the common law empowers police to use photographs they hold. As the Divisional Court explained in *Bridges:*[108]

> [T]he police may make reasonable use of a photograph of an individual for the purpose of the prevention and detection of crime, the investigation of alleged offences and the apprehension of suspects or persons unlawfully at large and may do so whether or not the photograph is of any person they seek to arrest or of a suspected accomplice or of anyone else. "The key is that they must have these and only these purposes in mind and must . . .

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104 *Brown et al v. Regional Municipality of Durham*, above n 104 at [47]-[48] ("The respondent submits that the police videotaping was not improper and did not violate any right of the appellants. In making that submission, counsel points out that the videotaping was not surreptitious, occurred in a public place and did not prolong the detention or in any way affect the physical circumstances of the appellants' detention. Counsel further argues that the videotaping had the added advantage of providing a permanent and reliable record of the conduct of the stops. He notes that even the appellants saw the advantage of videotaping as they too videotaped some of the stops. I think the respondent's submissions are sound" (citing *R v Parsons* (1993) 15 OR (3d) 1 (Ont CA) and *R v Shortreed*, above n 103.) In *R v Nolet*, 2010 SCC 24, [2010] 1 SCR 851 the Supreme Court criticised *Brown's* focus on the predominant purpose of the traffic stop (at [38]-[39] per Binnie J) but did not comment on the outcome in that case.

105 *R v Abbey* [2006] OJ No. 4689 (Ontario Superior Court of Justice) at [49] (police took photographs "for information gathering purposes"), [79] ("the photographs of the front of the t-shirt could have been lawfully taken without the accused's consent, although I have found that his consent was properly given"), and [82]-[84]. Since 2017, Ontario law has, under Regulation 58/16, imposed greater limitations on when police can collect "identifying information" from an individual for various purposes, including "inquiring into suspicious activities to detect offences" and "gathering information for intelligence purposes". Identifying information must not be collected "in an arbitrary way"; to pass muster, the officer's reasons must include "details about the individual that cause the officer to reasonably suspect that identifying the individual may contribute to or assist in an inquiry [into suspicious activities to detect offences] or the gathering of information [for intelligence purposes]." Subject to limited exceptions, an officer must also inform the individual why she is collecting the information and that the individual is not required to provide it. Unless the requirements of the Regulation have been complied with, identifying information held in a police database can only be accessed for limited purposes (for example, if access is needed for the purpose of an ongoing police investigation).

106 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 (SC), **ABOA tab 1**; *Lorigan (CA)*, above n 86 at [29] and [37], **RBOA tab 5,** approving *R v Fraser* [1997] 2 NZLR 442 (Full CA) (*"Fraser"*), **RBOA tab 8,** and *R v Gardiner* (1997) 15 CRNZ 131 (CA) (*"Gardiner"*), **RBOA tab 9.** Leave to appeal to this Court was declined: *Lorigan v R* [2012] NZSC 67.

107 SC COA at 31 – 33 (at [72]-[74]).

108 *Bridges (HC),* above n 58 at [72]: **RBOA tab 18**, citing *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804 (QBD), 810 per Laws J.

> make no more than reasonable use of the picture in seeking to accomplish them".

The Court accordingly held that the compilation of "watch-lists", comprising photographs of persons of interest, for intelligence purposes fell "well within" the police's common law powers.[109]

50. It follows, in the Crown's submission, that DS Bunting had the power at common law to record information about Mr Tamiefuna, including taking his photograph. In so acting, he was performing his duty as a police constable to detect possible crimes. The fact "there was no… investigation of Mr Tamiefuna underway when his photographs were taken" is not determinative.[110] Neither is the fact charges were not filed in relation to that property. The lawfulness of the taking of a photograph cannot turn on the later use, or significance, of that photograph.[111]

This common law power is consistent with statute

51. In its judgment, the Court of Appeal held that provisions in both the Policing Act 2008 and the Search and Surveillance Act 2012 (**SSA**) were inconsistent with the police having a general power to take photographs in a public place.[112]

52. The Court's analysis of these provisions was, however, flawed.

53. Sections 32 and 33 of the Policing Act appear under the heading "Identification of people detained by Police". Section 32 applies where a person is in lawful custody at a Police station (or other equivalent place), having been "detained for committing an offence". A constable may take such a person's "identifying particulars", including a photograph, and is empowered to use reasonable force to achieve that purpose.

54. Section 33 applies where a constable "has good cause to suspect a person

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109 *Bridges (HC),* above n 58 at [77]: **RBOA tab 18**. Although *Bridges* was overturned on other grounds, the police's power to compile such watch lists and to cross-reference them using facial recognition technology was not challenged on appeal: *Bridges (CA)*, above n 101 at [38]: **RBOA tab 19**. See also *In re JR38*, above n 62, where the Court found no violation of art 8 when the police published the photograph of a 14-year-old rioter in two newspapers: **RBOA tab 16**.

110 SC COA at 31 (at [70]).

111 Compare [70] of the Court of Appeal judgment (ibid): "The decisive point here concerns the factual setting — being one in which no attempt was made to show the photographs were taken or retained in the context of an ongoing police inquiry or for any other lawful purpose. *Different considerations would apply if there were such an inquiry, and subsequent prosecution*."

112 SC COA at 29 – 31 (at [63]–[70]) (photography of Mr Tamiefuna "lacked legal authorisation" because it "did not conform with the circumstances in which Parliament has authorised such conduct on the part of the police").

of committing an offence and who intends to bring proceedings against the person in respect of that offence by way of summons". The constable may both detain the person and use reasonable force to secure the person's identifying particulars.

55. A failure to comply with a direction given by a constable exercising either power is a criminal offence.[113]

56. Identifying particulars obtained under either section may be used not only in relation to the suspected offence but in the future "for any lawful purpose". Where, however, the person's guilt is not later established, s 34 requires police to destroy any photographs and prints that were taken compulsorily.

57. As will be apparent, then, ss 32 and 33 apply at a particular point during the criminal process, for the purpose of ensuring a defendant is reliably identified – both for use in the current investigation, but also for use in possible future investigations.[114] To that end, Parliament has empowered police to *compel* the provision of identifying particulars.[115] It is that compulsion, and the conferral of a power to use reasonable force, which are at the heart of the provisions. Such a regime cannot have been intended to limit police officers' common law powers to take and retain identifying particulars, including photographs, of individuals for policing purposes where no coercion or compulsion is involved.[116] Similar arguments have been rejected in both the United Kingdom[117] and Canada.[118] And the Policing Act itself recognises that constables retain

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113 Sections 32(4) and 33(4).

114 *Duffield v Police (No 2)* [1971] NZLR 710 (CA) at 712-3 (the purpose of the predecessor provision, s 57 of the Police Act 1958, was "to empower police officers to take such particulars as may serve to establish that person's identity in respect of the offence for which he has been arrested" (at 712), but (at 713) implicitly any particulars obtained under the provision "may be filed in police records for future use".)

115 The legislation confers a "power to insist upon the furnishing of relevant particulars" (*Duffield v Police (No 2)*, above n 114 at 712) and envisages particulars being provided "under pain of legal penalty for non-disclosure": *Moulton v Police* [1980] NZLR 443 (CA) at 446.

116 The provisions were carried over largely unchanged from the 1958 Act: Policing Bill 2007 (195-1) (explanatory note), at 12, **RBOA tab 1**: "[Clause 32, the predecessor to s 32] is substantially the same as section 57 of the police Act 1958.") The text of subs 32(1) and 33(1) were added at select committee stage: the select committee expressed concern that the provisions might be interpreted "to mean that taking identifying particulars must be for the single purpose of commencing a prosecution, rather than, as intended, for any legitimate Police purposes": Policing Bill 2008 (157-2) (select committee report) at 4-5, **RBOA tab 2**.

117 *Murray v United Kingdom*, above n 91 at [30], quoting the English Court of Appeal judgment. Section 11(4) of the Northern Ireland (Emergency Provisions) Act 1978 is set out at [39] of the judgment: **RBOA tab 25**.

118 *R v Shortreed*, above n 103 at 304 ("[t]he fact that photographs of a suspect can be taken without his consent following his arrest, does not mean that such consent is necessary before his arrest").

common law powers.[119]

58. The Court of Appeal also erred in holding that the warrantless search power in s 16 of the SSA indicated that "police powers to photograph in a public place and retain the images are intended to be closely confined".[120] Section 16, however, concerns physical searches of a person, to which high expectations of privacy attach.[121] That Parliament chose to restrict the exercise of such a power to cases involving serious offending is both unsurprising and unilluminating. It does not speak to the far less intrusive power to take photographs, overtly and without compulsion, in a public place.

59. Indeed, in enacting the SSA Parliament anticipated the continuing existence of the common law power:

59.1 The Law Commission report that preceded the SSA considered that photography by law enforcement officers in public places fell in the category of activities that did not need to be regulated by search and surveillance legislation.[122]

59.2 The Select Committee that considered the Search and Surveillance Bill similarly noted that "there is no legislative regime regulating visual surveillance devices, *which may be used without restriction by any enforcement officer where no trespass is involved*".[123]

59.3 Consistent with those views, under the SSA a police officer does not need a surveillance device warrant to record events occurring

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119 Section 4, for example, defines policing as including "the exercise by Police employees of powers that they have because they are constables or authorised officers (*whether the powers are statutory or given by the common law*)"; and s 23(1) provides that "[n]othing in section 18(4) [providing the Commissioner with "all of the rights, duties, and powers of an employer"] limits or affects the powers and duties conferred or imposed on the office of constable by common law or any enactment." See also *Smith v R,* above n 75 at [34]-[37]: **RBOA tab 12**.

120 SC COA at 30-31 (at [68]).

121 *R v Williams* [2007] 3 NZLR 207 (CA) (*"Williams"*) at [113], **ABOA tab 3.**

122 Law Commission, *Search and Surveillance Powers* (NZLC R97, June 2007, Wellington) at [2.51] ("there are certain law enforcement activities that can be readily identified as unlikely to unreasonably limit reasonable expectations of privacy. Examples include…taking a photograph of someone in a public place… In our proposals we recommend that where it is possible to identify law enforcement activities that either do not limit reasonable expectations of privacy at all, or which place reasonable limits on them, then they should be identified as such.") See also [11.70] – [11.74], where, in the course of proposing a new surveillance device warrant regime, the Commission discussed the places in which activities might be considered "private activity". Most relevantly, the Commission was clear that a person who undertakes activities in "non-private buildings" could not "reasonably expect that others including enforcement officers will not be observing them". As to activities outside buildings, the Commission only considered a more nuanced approach was required in relation the curtilage of a private building, noting that such activities are not as private as those that occur within private buildings as they "are more susceptible of observation by a casual observer and enforcement officers". See generally Chapter 11: **RBOA tab 40.**

123 Search and Surveillance Bill 2009 (45—2) (select committee report) at 3 (emphasis added): **RBOA tab 3**.

in public places (for example, by video).[124]

59.4 Nor is a surveillance device warrant required to record only what an officer can observe or hear while lawfully in private premises.[125]

59.5 More generally, as the Court of Appeal recently confirmed, "[t]he parliamentary history of the [SSA] indicates that it was not intended to constitute a comprehensive codification of the common law, let alone an exhaustive list of statutory powers."[126]

Residual freedom

60. Given the scope of the police's common law powers, discussed above, recourse may not be needed in the present case to the broader right of the police to act as any other citizen may lawfully act.[127]

61. The Crown's position, nevertheless, is that there is no rule of law in New Zealand that prohibits constables from acting in the course of their duties without positive legal authorisation. The Court of Appeal for England and Wales recently emphasised this fundamental principle:[128]

> [38] … Put simply, the judge was correct to hold that police officers do have power at common law to ask questions of individuals and provide the answers to the Secretary of State in order to assist him in the exercise of his governmental function of enforcing immigration law. There are, as the judge found, two reasons for this. First, as a matter of capacity, a police office[r] has the power to do anything an ordinary citizen can do, including non-coercive questioning of a person in custody; secondly, and in any event, the questioning is for a police purpose.
>
> [39] On the first point, a police force is no more nor less than a number of police officers each of whom has the same powers and rights as an ordinary citizen, so they may, as a matter of vires, do anything that a natural

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124 Sections 46 and 47 of the SSA; *Lorigan (CA),* above n 86 at [38] ("the Search and Surveillance Act 2012, which was recently passed by Parliament, proceeds on an assumption that surveillance of a public place in a manner not involving trespass is lawful, and does not require a surveillance device warrant. Parliament appears to have legislated on the basis that no statutory authorisation for such activity is necessary even if the surveillance is a search"): **RBOA tab 5.** Although ss 63 and 64 impose limits on retention of surveillance data obtained via warrant, these do not obviously apply where no warrant is required.

125 SSA, s 47(1)(a).

126 *Smith v R,* above n 75 at [35], **RBOA tab 12**.

127 See generally B V Harris "The 'Third Source' of Authority for Government Action" (1992) 108 LQR 626; B V Harris "The 'Third Source' of Authority for Government Action Revisited" (2007) 123 LQR 225. See especially *Collins v Wilcock* [1984] 1 WLR 1172 (DC) at 1172 ("a police officer has his rights as a citizen, as well as his duties as a policeman"); *R (Centre for Advice on Individual Rights in Europe) v Secretary of State for the Home Department* [2018] EWCA Civ 2837, [2019] 1 WLR 3002 (CA) at [38]: **RBOA tab 20**; and *Director of Public Prosecutions v Ahmed* [2022] 1 WLR 314 (DC) at [25](i) ("it is important not to lose sight of the fact that these [police] duties and powers do not constrain or restrict the powers and rights police officers have as ordinary citizens").

128 *R (Centre for Advice on Individual Rights in Europe) v Secretary of State for the Home Department*, above n 127 at [38] – [39] (original emphasis): **RBOA tab 20**. See also *Dallison v Caffery* [1965] 1 QB 348 at 366 (per Lord Denning MR) and at 370 (per Diplock LJ), holding that constables' powers are "extra" to those of private persons.

> person could do without the use of coercive powers, including asking questions that a member of the public could lawfully ask. It is true that police officers have particular duties and obligations, and have powers *additional* to those of members of the public and specific to their office that "authorise" the police to do things that would otherwise be unlawful. However, in our judgment, these duties and powers do not constrain or restrict the powers and rights police officers have as ordinary citizens.

62. This, in part, flows from the origins of the office of constable.[129] Historically, "the constable was merely a citizen whose business it was to keep order" and, as such, "the only thing that distinguished the constable in this respect from any other of his fellow citizens was that the law granted him a slightly greater power of arrest".[130] While the powers of constables have expanded over time, Lord Devlin has explained that "there has never been any departure from the principle that the policeman is to be treated as if he were an ordinary citizen".[131]

63. This is also the position in New Zealand. As O'Regan P explained for the Court of Appeal in *Lorigan*, the decisions of that Court in *R v Fraser* and *R v Gardiner* and of this Court in *Hamed* reflect this approach.[132]

64. In *Fraser,* the appellant argued that because the video surveillance was conducted without a warrant (or other authority) it was unlawful. The Full Court unanimously rejected that argument, holding that absent "any statutory or common law prohibition", the police conduct was not unlawful.[133] That reasoning was later followed in *Gardiner*, where the Court of Appeal rejected the argument that s 21 of the NZBORA had rendered video surveillance unlawful because it was not regulated by domestic law:[134]

> Such a radical change to the common law is not to have been taken to have occurred except by direct expression. It is to be noted that, at an earlier stage of the *Malone* litigation…, Megarry J, speaking of telephone tapping in the United Kingdom, said that it could lawfully be done in terms of

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129 See generally TA Critchley *A History of Police in England and Wales* (Rev ed, Constable and Company, London, 1978). See also *Auckland Unemployed Workers' Rights Centre Inc v Attorney-General* [1994] 3 NZLR 720 (CA) at 727, per Hardie Boys J: "Police officers hold an office different from that of any other officer of the Crown. It is their responsibility to preserve the peace and to that end they swear the constable's oath: an oath to serve the Queen."

130 Patrick Devlin *The Criminal Prosecution in England* (Oxford University Press, London, 1960) at 14: **RBOA tab 37**.

131 *Ibid*.

132 The existence of this residual freedom has also recently been recognised by the Law Commission and the Ministry of Justice: see *Review of the Search and Surveillance Act 2012* (NZLC R141, June 2017, Wellington) at [4.19]–[4.22]: **RBOA tab 39**. See also *R v Fraser* [2005] 2 NZLR 109 (CA) at [33], holding that the law imputes an authority to enter private property in certain emergency circumstances and, accordingly, "[s]uch entry is lawful whether by a citizen or a policeman": **RBOA tab 8.**

133 *Fraser,* above n 106 at 452: **RBOA tab 8.**

134 *Gardiner,* above n 109 at 134: **RBOA tab 9**.

> domestic law because, at that time, there was nothing to make it unlawful. This is the position for video surveillance (without sound recording) in New Zealand.

65. Tipping J endorsed an equivalent approach in *Hamed*, holding that "the police are entitled to do what any member of the public can lawfully do in the same circumstances".[135] While Blanchard, McGrath and Gault JJ did not expressly endorse this passage, it is clear they too did not consider the absence of positive legal authority for the police actions had rendered the resulting evidence unlawfully obtained.[136]

66. This Court's decision in *Tararo* is also consistent. There, the Court was unanimous that covert video recording undertaken by an undercover police officer while on private property was not unlawful. Two features of the Court's reasoning stand out. First, the Court conceptualised the implied licence as being available to "[m]embers of the public" and "citizens generally", "*including police officers*".[137] Second, the decision confirms that the covert videography could be conducted lawfully without a warrant[138] and did not, in the circumstances, breach s 21 of the NZBORA.[139]

67. Finally, Parliament has legislated on this basis in the SSA.[140] As noted above, the Act only requires the police to obtain surveillance device warrants in narrowly defined circumstances, including where use of the device involves trespass (to land or goods) or involves the observation of private activity in the curtilage of private premises for more than three hours in a 24-hour period or eight hours in total. In less intrusive circumstances, then, the Act clearly envisages surveillance devices being used lawfully without a warrant.

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135 *Hamed,* above n 106 at [217]: **ABOA tab 1**.

136 Rather, the source of unlawfulness was the police trespass on private property and the resulting breach of s 21: at [155], [159], [178]–[179] and [183] (per Blanchard J), at [263] and [266] (per McGrath J), and at [283]–[284] (per Gault J). Moreover, McGrath J had, in both *Ngan* and *TVNZ v Rogers* [2007] NZSC 91, [2007] 2 NZLR 277, **RBOA tab 14,** previously set out his support for the principle relied on by Tipping J; Gault J had delivered the Court of Appeal's judgment in *Fraser*; and Blanchard J was the author of the Court's opinion in *Gardiner*.

137 *Tararo v R* [2010] NZSC 157, [2012] 1 NZLR 145 at [11] (emphasis added): **RBOA tab 13.**

138 At [14] (holding that the implied licence cannot be invoked by the police "to do anything that by law requires a warrant").

139 At [7].

140 Previously, private investigators were prohibited from taking photographs of people without consent by s 52 of the Private Investigators and Security Guards Act 1974. The Law Commission recommended repealing that prohibition, observing that it meant "private investigators have fewer rights than other members of the public in this regard": Law Commission *Invasion of Privacy: Penalties and Remedies* (NZLC R113, January 2010, Wellington) at [6.31]–[6.42]. Parliament accepted that advice and ultimately removed the restriction (which had been included as cl 66 in the Bill as introduced) when it enacted the Private Security Personnel and Private Investigators Act 2010.

68. It follows, in the Crown's submission, that absent a breach of s 21 of the NZBORA, it was lawful for DS Bunting to photograph Mr Tamiefuna.

Section 21 of the NZBORA

69. Section 21 provides "the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise". Rather than guaranteeing any broad individual right to privacy, the right is designed to regulate state actions involving search and seizure against a yardstick of reasonableness.[141]

The taking of the photograph did not invade a reasonable expectation of privacy

70. While what will constitute a "search" has generated considerable debate,[142] the test generally applied is whether the activity in question invaded a reasonable expectation of privacy.[143] This, in turn, has two limbs. First, the person must have held an expectation of privacy. Second, that expectation must be one "that society is prepared to regard as reasonable".[144]

71. In applying the second limb to information-gathering activities, courts often consider whether the information in issue forms part of the "biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination by the state", including that "which tends to reveal intimate details of the lifestyle and personal choices of the individual".[145] This is a contextual

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141 *R v Jefferies* [1994] 1 NZLR 290 (CA), **ABOA tab 2,** at 302 per Richardson J ("neither the Bill of Rights nor the International Convention [on Civil and Political Rights] gives a general guarantee of privacy…Reading s 21 literally the entitlement it affirms is to be protected against unreasonable search and seizure")*; Hamed*, above n 106 at [161] per Blanchard J ("the affirmation of a protection against unreasonable search or seizure is not … a guarantee of a 'reasonable' expectation of privacy"): **ABOA tab 1**; *Ngan*, above n 59 at [104] per McGrath J ("no general guarantee of privacy was intended or given to the Bill of Rights Act. The role of s 21 of the Bill of Rights Act is to regulate state acts involving search and seizure against a yardstick of reasonableness … application of s 21 will set the point at which privacy rights are limited to accommodate community rights, particularly the public interest in law enforcement, including the detection and prosecution of criminal behaviour"): **RBOA tab 10**. *See also* Butler and Butler, *The New Zealand Bill of Rights Act: A Commentary* (2nd ed., 2015) at [18.6.6] (expressing the view "s 21 does not provide a general protection for privacy interests"), and the White Paper *A Bill of Rights for New Zealand* (1985) at [10.144] ("The Bill (like the Canadian Charter) gives no general guarantee of privacy"). *Cf Hamed*, *ibid* at [10] per Elias CJ, **ABOA tab 1**; *Hosking v Runting*, above n 91 per Tipping J at [224] (s 21 "is not very far from an entitlement to be free from unreasonable intrusions into personal privacy"): **RBOA tab 4**.

142 See for example *Ngan*, above n 59 at [106]-[111] per McGrath J, **RBOA tab 10,** cited in *Hamed,* above n 106 at [164] per Blanchard J and at [220] per Tipping J: **ABOA tab 1**. In *Ngan* Tipping J left open whether a search was limited to "deliberate evidence-gathering in a criminal context": at [41], **RBOA tab 10**.

143 *Hamed*, above n 106 at [163] per Blanchard J: **ABOA tab 1**, cited with approval by the majority in *R v Alsford*, above n 76 at [50]: **ABOA tab 7**.

144 *Alsford*, *ibid* at [63]: **ABOA tab 7**.

145 *Alsford, ibid* at [63]: **ABOA tab 7** citing *R v Plant* [1993] 3 SCR 281, **ABOA tab 22**. In *R v Tessling* 2004 SCC 67, [2004] 3 SCR 432 ("*Tessling*") the Supreme Court of Canada described this category of privacy interest as "informational privacy" (distinct from personal and territorial privacy): **RBOA tab 30**.

inquiry, focusing on the particular circumstances of the case.[146] But it is also an objective inquiry: would society be prepared to regard an expectation of privacy in the circumstances as reasonable?[147] Alongside the impact on privacy, therefore, the government's legitimate interest in law enforcement must also be weighed.[148] As the Supreme Court of Canada held in *R v Tessling*:[149]

> At the same time, social and economic life creates competing demands. The community wants privacy but it also insists on protection. Safety, security and the suppression of crime are legitimate countervailing concerns.

72. For the following five reasons, the Crown submits DS Bunting did not carry out a search when he took Mr Tamiefuna's photograph.

73. First, and most importantly, the photograph was taken on a public footpath. As Blanchard J explained in *Hamed*, even extended video surveillance of a public place will not generally be a search (or seizure). This is because:[150]

> … objectively, it will not involve any state intrusion into privacy.[151] People in the community do not expect to be free from the observation of others, including law enforcement officers, in open public spaces such as a roadway or other community-owned land like a park, nor would any such expectation be objectively reasonable.

74. This reasoning extends not only to people like Mr Tamiefuna who are in a public place, but also to people who are on private land but are visible from public space (unless the surveillance is particularly prolonged[152] or employs

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146 *Alsford, ibid* at [63]: **ABOA tab 7**.

147 *Alsford*, *ibid* at [63]: **ABOA tab 7**, citing *R v Plant* [1993] 3 SCR 281 ("*Plant*").

148 *Ngan*, above n 59 at [111] per McGrath J (whether a particular activity amounts to a search "turn[s] on a value judgment that considers the nature of the particular examination or investigation by government officials and its impact on the privacy and security of the person subjected to it"): **RBOA tab 10.** In *Alsford* a majority of this Court saw McGrath J's approach as similar to Blanchard J's in *Hamed* (*Alsford* at [48] fn 42). See also *Tessling,* above n 145 at [17]: **RBOA tab 30** and *Jefferies*, above n 141 at 302: **ABOA tab 2**, *citing Hunter v Southam Inc* [1984] 2 SCR 145 at 159-60 per Dickson J ("... an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement"). See also *R v A* [1994] 1 NZLR 429 (CA) at 437 (per Richardson J): "The expectation of privacy is always important but it is not the only consideration in determining whether a search or seizure is unreasonable. Legitimate state interests including those of law enforcement are also relevant": **RBOA tab 6.**

149 *Tessling*, above n 145 at [17]: **RBOA tab 30**.

150 *Hamed,* above n 106 at [167] (per Blanchard J). Similarly, Tipping J confirmed at [224] that "drivers on a public road have little expectation of privacy in respect of the fact of their doing so", and Elias CJ at [79] agreed that "the expectation of privacy in respect of information about which cars pass along a public road is not high": **ABOA tab 1.**

151 Concern with how a law enforcement agency may use images so captured in a public place, for example by a CCTV camera, can, if necessary, be controlled by privacy legislation or by the civil law.

152 *Hamed*, above n 106 at [167]-[168] per Blanchard J ("If the surveillance is of a public place, it should generally not be regarded as a search (or a seizure, by capture of the image) because, objectively, it will not involve any state intrusion into privacy…It should make no difference to whether a surveillance is a search or seizure that the filming of the public place was done from private land or that filming of any kind is done covertly. The important matter is whether the subject of the surveillance was a place within public view"); see also *Hamed* fn 98 per Blanchard J ("It is possible that a prolonged video surveillance of even such an open private area might involve such an intrusion that it would amount to a search"): **ABOA tab 1.**

technologies that capture what cannot be seen with the naked eye).[153] Thus, in *Lorigan*, the Court of Appeal held that the five-month covert video surveillance of a person's driveway was not a search, except where night-vision cameras captured images not visible with the naked eye.[154]

75. The fact that Mr Tamiefuna had been "compelled by circumstances" to exit the car does not change the analysis.[155] He chose to travel in a vehicle along a public road. Such vehicles are routinely stopped by police to check compliance with transport laws. That enforcement of those laws led to Mr Tamiefuna standing on a footpath does not point to him having any greater expectation of privacy than, for example, a person who exits a car that has broken down.[156] There is no sense in which Mr Tamiefuna found himself involuntarily in a public place.

76. Second, not only do people expect to be observed while in public, but they must also know their image may be captured on photograph or video. CCTV cameras, in particular, are widespread.[157] Indeed, on the day of the aggravated robbery, Mr Tamiefuna was recorded at least twice by private cameras, once from a residential property and once at commercial premises. Cameras on mobile phones are similarly ubiquitous; as DS Bunting noted in evidence, "members of the public will often take a photograph of me when I'm in a public place".[158]

77. Even before the widespread use of such technology, the Court of Appeal in *Hosking v Runting* did not consider there was any reasonable expectation of privacy in relation to images taken of young children in a public street.[159]

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153 *Hamed*, above n 106 at [167] per Blanchard J: **ABOA tab 1** and *Lorigan (CA)*, above n 86 at [25]: **RBOA tab 5**.

154 *Lorigan (CA)*, above n 86 at [23]–[25]: **RBOA tab 5**.

155 SC COA at 27 (at [58]).

156 In *Ngan*, above n 59, McGrath J considered that a car that had been involved in an accident on a public road was "not [a location] in which a motorist can reasonably expect official respect for a high degree of privacy": at [112], **RBOA tab 10**.

157 See *Kinlock v HM Advocate* [2012] UKSC 62, [2013] 2 AC 93 at [19]: "A person who walks down a street has to expect that he will be visible to any member of the public who happens also to be present. … He can also expect to be the subject of monitoring on closed circuit television in public areas where he may go, as it is a familiar feature in places that the public frequent. The exposure of a person to measures of that kind will not amount to a breach of his rights under article 8." **RBOA tab 18.** See also *In re JR38,* above n 62, in which all members of the Court agreed that there was no reasonable expectation of privacy in relation to the taking, retention and publication of photographs of a 14-year-old who had been involved in rioting: at [55], [100] and [112]: **RBOA tab 16**.

158 COA (Evidence) at 12.

159 *Hosking v Runting*, above n 91 at [164] ("[t]he photographs… do not disclose anything more than could have been observed by any member of the public", per Gault and Blanchard JJ), at [226] ("it would seem very strained to view photographs as a form of seizure, or indeed search; and, in any event, seizing the image of a person who is in a public place could hardly be regarded as unreasonable, unless there was some very unusual dimension", per Keith J) and at [271] (per Anderson P): **RBOA tab 4.**

Similarly, in *Catt*, Lord Sumption considered the systematic collection and retention of information about a person's protest activities, including his photograph and descriptions of his appearance, involved only a "minimal" privacy intrusion: the information was "in no sense intimate or sensitive" but instead related to "overt activities in public places".[160] And, in *R v Kawall*, Jones J held that if a digital photograph of the defendant in a public place did engage the biographical core of personal information, "it was only marginally engaged… if it was at all".[161]

78. This is consistent with the approach in North America. The Canadian Supreme Court has confirmed that "a person can have no reasonable expectation of privacy in what he or she knowingly exposes to the public, or to a section of the public".[162] A state agent's observation of a person in a public setting, even using binoculars, does not therefore infringe a reasonable expectation of privacy.[163] A number of decisions have further confirmed that police photography or video surveillance of individuals in a public place was not a search.[164]

79. Similarly, in the United States, it is well established that "[w]hat a person knowingly exposes to the public… is not a subject of Fourth Amendment

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160 *Catt (SC),* above n 82 at [26]: **RBOA tab 21**. See also *Wood,* above n 92 at 140 ("It is no surprise that the *mere taking* of someone's photograph in a public street has been consistently held to be no interference with privacy. The snapping of the shutter of itself breaches no rights, unless something more is added.") **ABOA tab 23**..

161 *R v Kawall* [2022] OJ No 4622, 2022 ONCJ 475 at [55]: **RBOA tab 29**.

162 *Tessling,* above n 145 at [40]: **RBOA tab 30**.

163 *Wise v R* [1992] 1 SCR 527 at [29] and [39] per Cory J, writing for the majority (**RBOA tab 31**): "All agree that it was quite proper for the police to physically observe the appellant and his car at all hours of the day and night. It is further agreed that these physical observations could be enhanced by the use of binoculars." La Forest J (dissenting) agreed: at [80] ("I have no doubt that the police, like other people, may observe our comings and goings when we place ourselves in open view, and I would also think that they may enhance their visual observations by the use of such instruments as binoculars. This type of observation does not pose grave or overriding threats to individual privacy.") *See also R v Evans* (1996) 1 SCR 8 at [50] per Major J ("The appellants could not have any reasonable expectation that no one, including police officers, would ever lawfully approach their home and observe what was plainly discernible from a position where police officers and others were lawfully entitled to be"), at [51] citing W. R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (2nd. ed. 1987 & Supp. 1995), Vol 1., at p. 320: "when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a "search" within the meaning of the Fourth Amendment."

164 *R v Shortreed,* above n 103 (police attempts to surreptitiously photograph a person for identification persons would not, if "done in a non-intrusive way and without trespass or other improper means, … [constitute] breach of privilege, an invasion of privacy or a violation of Charter rights"); *R v Elzein* [1993] RJQ 2563 (Québec CA) (police video surveillance of people coming and going from commercial premises); *R v Ngo* 2022 ONSC 3700 at [27] (video surveillance of the rear of a commercial building); *R v McPherson* 2023 ONSC 232 (police video surveillance of the exteriors of private residences and commercial buildings over the course of many months); *R v Kawall,* above n 161 (photograph of a man for investigative purposes while in a public park): **RBOA tab 29**.

protection",[165] and so neither "mere visual observation"[166] nor using a camera to record (and even enhance) what the naked eye can see constitute a search.[167] In *People v Bauer*,[168] for example, the Court found the appellant had no reasonable expectation of privacy when he was photographed (likely for intelligence purposes)[169] by police standing on the footpath in front of a Harley Davidson dealership.[170]

80. Third, the photograph in issue recorded no more than what the officer could see. As a line of participant recording cases make clear, a person can have no reasonable expectation that a person with whom they are interacting will not later disclose that interaction. In such circumstances, it is not unreasonable for the other person to make a full and accurate record of the interaction, via audio (as in *R v A*[171] and *R v Barlow*)[172] or video recording (as *R v Smith (Malcolm)*[173] and *Tararo v R*).[174] These decisions also emphasise that "[a]voidance of the need for reliance on fallible memory… is in the interests of justice for both Crown and defence" (*Barlow*).[175] Or, as the United States Supreme Court put it in *Lopez*:[176]

> [T]he device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose. And the device was not planted by means of an unlawful physical invasion of petitioner's premises under circumstances which would violate the Fourth Amendment. It was carried in and out by an agent who was there with petitioner's assent, and it neither saw nor heard more than the agent himself.
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> …

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165 *Katz v United States* 389 US 347 (1967) at 351 per Stewart J: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection… But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

166 *United States v Jones*, 565 US 400 (2012) at 412. See also *Kyllo v United States* 533 US 27 (2001) at 32: "visual observation is no "search" at all": **RBOA tab 34**, and *California v Ciraolo* 476 US 207 (1986) at 213: the Fourth Amendment does not "require law enforcement officers to shield their eyes when passing by a home on public thoroughfares": **RBOA tab 32**. Nor is it a "search" for an officer to observe a person's appearance or behaviour during a traffic stop: *People v Carlson* 677 P 2d 310 (1984) at 316 ("a driver of a motor vehicle has no legitimate expectation of privacy in his physical traits and demeanor that are in the plain sight of an officer during a valid traffic stop"); *Hulse v State* 961 P 2d 75 (Mont. 1998) at 85.

167 *Dow Chem. Co. v. United States* 476 US 227 (1986) at 238 ("[t]he mere fact that human vision is enhanced somewhat…does not give rise to constitutional problems"): **RBOA tab 33**; *California v Ciraolo*, above n 166 at 213: **RBOA tab 32**. *See also United States v Jackson* 213 F 3d 1269 (10th Cir 2000) at 1280: "The use of video equipment and cameras to record activity visible to the naked eye does not ordinarily violate the Fourth Amendment."

168 *People v Bauer* 140 AD 2d 450 (NY 1988) at 451 ("Having made himself readily available for public viewing, the defendant could not have any reasonable expectation that his activities on a public street or sidewalk could not be scrutinized").

169 Notably, the photographs were taken more than a week before the assault committed by the appellant and, together with a "vast array of photographs" of other members of the gang, allowed his identification.

170 *Ibid* at 451.

171 *R v A,* above n 148 at 437 (per Richardson J), at 440 (per Casey J) and at 449 (per Robertson J): **RBOA tab 6.**

172 *R v Barlow* (1995) 14 CRNZ 9 (CA) at 22 (per Cooke P), at 33 (per Richardson J) and at 40 (per Hardie Boys J): **RBOA tab 7**.

173 *R v Smith (Malcolm)* [2000] 3 NZLR 656 (CA) at [52]: **RBOA tab 11**.

174 *Tararo,* above n 137 at [14] and [24]: **RBOA tab 13.**

175 *Barlow*, above n 172 at 40 (per Hardie Boys J, with whom Cooke P agreed): **RBOA tab 7**.

176 *Lopez v United States* 373 US 427 (1963) at 439: **RBOA tab 35**.

> Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment.

81. In *Tararo*, this Court approved the above passages from *Barlow* and *Lopez*, as well as the following passage from *United States v White*:[177]

> If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.

82. Fourth, as this Court explained in *Alsford*, an analysis of the privacy principles in the present context is of little "independent significance".[178] When considering whether s 21 has been breached, the focus is the nature of the conduct rather than compliance with various privacy principles.[179] Requiring trial courts to analyse those principles would add length, rather than depth, to the s 21 analysis. This is particularly so given the Privacy Act itself makes clear that the principles "do not confer on any person any right that is enforceable in a court of law";[180] and, even under Part 5 of the Act, the mere breach of a principle is not enough to amount to "an interference with the privacy of the individual" thereby warranting a remedy.[181]

83. Where there has been a breach of privacy principles, it does not follow that an unreasonable search has occurred:[182] the principles apply to a wide range of personal information, "from highly personal to insignificant",[183] and not all such information will attract a reasonable expectation of

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177 *Tararo,* above n 137 at [19] per Tipping J: **RBOA tab 13**, citing *United States v White* 401 US 745 (1971): **RBOA tab 36**.

178 *Alsford,* above n 76 at [40]: **ABOA tab 7**.

179 *Alsford,* above n 76 at [40]: **ABOA tab 7**.

180 Privacy Act 2020, s 31(1) (other than principle 6(1), which is enforceable against public sector agencies). Nor do the privacy principles set bright-line rules: Law Commission, *Review of the Law of Privacy, Stage 4* (NZLC R123, June 2011, Wellington), at [2.9] ("The Act deliberately takes a flexible, open-textured approach to regulating the collection, storage, use and disclosure of personal information. Rather than setting out strict rules about how personal information may be handled, the Act is based on a set of 12 privacy principles. These principles provide agencies with a high degree of flexibility in terms of how they comply with them") and [2.13] ("[I]nherent in the principles-based approach is that the Act does not provide the certainty of "bright line" rules"): **RBOA tab 38**.

181 The Act enables complaints about "interferences with privacy", a concept that demands not only breach of a principle but also either consequent harm, interference with the complainant's rights, or significant loss of dignity: Privacy Act 1993, s 11(2) (*cf* Privacy Act 2020, s 31(1)).

182 *Alsford*, above n 76 at [47] (breach of a privacy principle does not necessarily trigger s 30(5); "the critical question is whether the data was obtained as a result of an unreasonable search or seizure in terms of s 21 of NZBORA. To answer this question, it must first be determined whether there has been a "search", and that depends on the nature of Mr Alsford's privacy interests in the information at issue"): **ABOA tab 7.**

183 *Alsford*, *ibid* at [39]. See also at [30] (the statutory definition captures information "from the very sensitive to the seemingly banal"): **ABOA tab 7.** Personal information "means information about an identifiable individual": Privacy Act 1993, s 2 (*cf* Privacy Act 2020, s 7).

privacy.[184] Nor does a breach mean evidence has been "unfairly", and thus improperly, obtained, as *Alsford* itself demonstrates.[185] On the other hand, compliance with the privacy principles does not guarantee that no search has occurred; for example, information lawfully disclosed to police under principle 11 may nevertheless give rise to a reasonable expectation of privacy, meaning s 21 is engaged.[186]

84. In any event, there was no breach of the privacy principles here, let alone in a way that is material to s 21:

84.1 The photograph was necessary – meaning reasonably required in the circumstances, rather than indispensable[187] – for a lawful policing purpose (principle 1): as already explained, it is well established that the police may gather intelligence that might lead to the detection of crime.[188]

84.2 The officer did not have to tell Mr Tamiefuna that he was collecting intelligence about a suspected offence (principle 3(1)). While not explored in evidence, it is not difficult to appreciate why telling a person that he is suspected of being connected to certain possibly stolen property would have prejudiced the ability of the police to detect or investigate offending (principle 3(4)(b)(i)).[189]

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184 *Alsford*, *ibid* at [133] per Elias CJ ("The [Privacy] Act applies to all types of personal information, whether or not it is sensitive or intimate, and whether or not it is information in which the individual has a 'reasonable expectation of privacy'."): **ABOA tab 7**. See also the majority decision at [64].

185 *Alsford*, *ibid* at [45]: **ABOA tab 7**.

186 *Alsford*, *ibid* at [64]: **ABOA tab 7** ("we do not agree with the approach taken in *R v R* that if information is obtained consistently with the privacy principles, in particular principles 2(2)(d) and 11(e), there will be no "search"); see also at [52]-[54], discussing *R v Thompson* [2001] 1 NZLR 129 (CA) and *R (CA201/2015) v R* [2015] NZCA 165.

187 *Lehmann v Canwest Radioworks Ltd* [2006] NZHRRT 35 at [47] (if "necessary" were read as meaning essential, it would impose "a very high standard indeed") and [50] ("Principle 1 is intended to set a standard that is workable and achievable, having regard to the circumstances of each case…[It] should be approached as setting a standard of reasonable rather than absolute necessity"); *Tan v New Zealand Police* [2016] NZHRRT 32 at [74.3] (necessity sets a higher threshold than "reasonableness"); [75] (necessary means more than "expedient"); and at [78], applying *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57 at [19] (necessary means "required by circumstances" - more than "expedient" but less than "indispensable"). The Law Commission considered recommending a revised test of "reasonable necessity" under principle 1, but concluded "requiring collection to be "reasonably" necessary would add nothing and might in fact lead to greater uncertainty": Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC R123, June 2011), at [3.14]-[3.15]: **RBOA tab 38**. See also Paul Roth *Privacy Law and Practice* (online ed, LexisNexis) at PA22.7(b) (the test for necessity is "not particularly strict").

188 In *Case Note 71808* [2006] NZPrivCmr 14 residents were peacefully protesting a property development in a public place when the property owner, which had suffered vandalism, arranged for a security guard to film them. The Privacy Commissioner rejected a submission that this collection had breached principle 1: filming the protesters was "connected to the lawful purpose of protecting the company's property and commercial interests."
The Privacy Act 2020 has since added principle 1(2), which requires that an agency may not collect "identifying information" if the purpose for which the information is being collected does not require it.

189 In *Alsford*, above n 76, a majority of the Supreme Court described the comparable exception under principle 11(e) as "broadly drafted", and noted "the test – belief on reasonable grounds that non-compliance is necessary – is a relatively low one": at [34]: **ABOA tab 7.**

84.3 The police were entitled to take and keep the photograph for intelligence purposes, even before it had been linked to a particular investigation. The Court of Appeal was thus wrong to find that its retention had also breached principle 9.[190]

85. For completeness, and fifth, the Crown notes the Court of Appeal relied on an Australian statutory provision, s 3ZJ of the Crimes Act 1914 (Cth), to conclude that the photography in issue "would not have been authorised in Australia".[191] That "fortified" the Court in finding a breach of s 21,[192] on the basis that "[i]t would be surprising… if this country's laws were less protective than Australia's in this field."[193]

86. It is, however, far from clear that DS Bunting's photography would not have been permissible in Australia.[194] Section 3ZJ, which appears in a part of the Act headed "Arrest and related matters", does not purport to limit or prohibit the use of police photography in other circumstances;[195] rather, it is directed at empowering the police to *compel* the provision of identifying particulars, much like our Policing Act;[196] and, importantly, the Surveillance Devices Act 2004 (Cth) expressly permits the use of "an optical surveillance for any purpose" (provided no trespass is committed).[197] Of contextual relevance, too, is the fact that Mr Tamiefuna's image would likely have been captured by one of the tens of thousands of police body-worn

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190 SC COA at 36, Court of Appeal judgment at [82] ("the photographs were not taken for the purpose of an investigation, so the image should not have been retained").

191 SC COA at 34, Court of Appeal judgment at [77].

192 SC COA at 33-34, Court of Appeal judgment at [76].

193 SC COA at 34, Court of Appeal judgment at [77].

194 In Queensland, for example, the Police Powers and Responsibilities Act 2000 makes clear in s 326(7) that nothing in its surveillance device warrant regime "stop[s] a law enforcement officer from using an optical surveillance device in a place where the presence of the police officer is not an offence" and, to that end, notes that a police officer "may… record activities in a public place". Similarly, while s 609A authorises the use of body-worn cameras, subs (3) provides that this "does not affect an ability the police officer… has at common law or under this Act or another Act to record images or sounds". The explanatory note to the Bill that introduced s 609A, moreover, indicated that Parliament's concern was not that such cameras required positive authorisation ("the absence of such an express [authorisation] provision does not make the use of body-worn cameras by police officers unlawful"), but that such cameras might inadvertently record private conversations: see Domestic and Family Violence Protection and Another Act Amendment Bill 2015 (Explanatory Note) at 2–3. See also the Surveillance Legislation Amendments (Personal Police Cameras) Bill 2018 (Tas), which (according to the Bill's fact sheet) was passed to "ensure the overt use of body-worn and hand-held cameras by police is lawful in a range of policing contexts", given the prohibition on the recording of private conversations in certain circumstances. Similarly, as Attorney-General's statement of compatibility explained, the Justice Legislation Amendment (Body-Worn Cameras and Other Matters) Bill 2017 (Vic), was enacted to ensure body-cameras and tablet computers could be used lawfully because "[w]hile body-worn can be used in most circumstances without legislative amendment, it is likely that their use may from time to time record private conversations": see (9 August 2017) 9 Victoria Parliamentary Debates 2189.

195 See also s 3D, which makes clear that the relevant part of the Act was not intended to limit or exclude the availability of other police powers.

196 See *R v Domokos* [2005] SASC 266, (2005) 92 SASR 258 at [120] per Doyle CJ (s 3ZJ "is an aid to the police, not a fetter on their ability to obtain or use material that is otherwise available"). In relation to similar provisions see also: *R v Ireland* (1970) 126 CLR 321 at 333-334; *Fullerton v Commissioner of Police* (1984) 1 NSWLR 159 at 163; *Lackenby v Kirkman* [2006] WASC 164 at [15]; and *R v SA* [2011] NSWCCA 60 at [26]-[33].

197 Surveillance Devices Act 2004 (Cth), s 37.

cameras in use in Australia.[198] More fundamentally, the Crown submits that the current legislative regimes in the various Australian states and territories provide little assistance in applying s 21 in this country.[199]

87. For these reasons, Mr Tamiefuna did not have a reasonable expectation of privacy in the circumstances. It follows that the act of taking his photograph was not a search under s 21.

The taking of the photograph was reasonable

88. Even if, contrary to the argument above, the officer's photograph did amount to a search, the Crown submits it was not an unreasonable search. Given the discussion above, the reasons for this can be stated briefly.

89. First, it was not unlawful for the photograph to be taken. It will only be in rare circumstances, usually relating to the manner of execution, that a lawful search will nevertheless have been unreasonable.[200] No such circumstances exist here.

90. Second, any intrusion into Mr Tamiefuna's privacy was, at most, minor. Indeed, the Court of Appeal itself recognised that "the facts that the photographs were taken in public and without objection moderate the intrusion on privacy interests".[201]

91. Third, it is usually reasonable for the police to make a record of what they are hearing or observing. Notably, the participant recording cases above involved both *covert* and *sustained* recording, meaning the subjects had no opportunity to avoid recordings that will have captured a significant amount of information. By contrast, overt and limited photography, as occurred here, will generally be less intrusive since it captures less information (here, a single image of Mr Tamiefuna) and its subject may

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198 See Robyn Blewer and Ron Behlau "'Every Move You Make… Every Word You Say': Regulating Police Body Worn Cameras" (2021) 44(3) UNSW Law Journal 1180 at 1182 ("[a]n estimated 30,000 BWCs will be deployed throughout Australia by the middle of 2021"). In addition to the legislation cited above, the police use of body-worn cameras is also authorised by the Surveillance Devices Act 2007 (NSW), s 50A; the Surveillance Devices Act 2007 (NT), s 14A; and the Crimes (Surveillance Devices) Act 2010 (ACT), s 43B.

199 See generally *R v A*, above n 148 at 449 ("A slavish adherence to Canadian cases will not necessarily provide the correct answer"): **RBOA tab 6,** and *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [279] ("while this Court should be fully aware of and alive to overseas decisions and the standards of conduct they implicitly involve, in the end it is New Zealand values and standards which we should adopt").

200 *Williams*, above n 121 at [24]: **ABOA tab 3**; *Ngan*, above n 59 at [44] per Tipping J, **RBOA tab 10**. *Cf Hamed*, above n 106 at [12] per Elias CJ (secret observation or eavesdropping): **ABOA tab 1**.

201 SC COA at 42, CA judgment at [100].

take steps to avoid it.[202]

92. Fourth, the fact that the police retained the intelligence noting and photograph does not change the s 21 analysis. When assessing the reasonableness of a search, the relevant point in time is when the information is gathered;[203] what police later do with that information cannot retrospectively change the legal character of what occurred earlier.[204] To that end, the Court of Appeal's reliance on decisions applying art 8 of the Convention was misplaced. That provision guarantees a broad right to private life,[205] which extends to elements of control over one's image;[206] and the mere storing of an individual's personal data constitutes an interference with private life.[207] Naturally, then, recording somebody in public may engage art 8, even if simply observing them would not.[208] Article 8 also regulates the retention and use of such data, requiring that this be proportionate to a legitimate aim.[209]

93. Even if retention could influence the s 21 analysis, there was nothing unreasonable about the police retaining the photograph of Mr Tamiefuna for the short period of (at most) three weeks before it implicated him in serious criminal offending. The decisions cited by the Court of Appeal do

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202 CA COA (Evidence) at 27 ("It's quite common that because I'm overtly taking photographs of people in this instance that if people didn't want to have their photograph taken they would just put their hand up to the camera… that is something which commonly occurs.").

203 *Hamed*, above n 106 at [163] (the individual must "subjectively have such an expectation [of privacy] at the time of the police activity") and fn 197 ("Concern with how a law enforcement agency may uses images so capture in a public place, for example by a CCTV camera, can, if necessary, be controlled by privacy legislation or by the civil law"): **ABOA tab 1**; *R v Jefferies*, above n 141 at 305 per Richardson J ("reasonableness is to be assessed when the search is about to take place and then, as to the manner of the search, while it is actually taking place… It is not legitimate to view searches with hindsight and justify them in the light of the results.") **ABOA tab 2.**

204 *R v Salmond* [1992] 3 NZLR 8, (1992) 8 CRNZ 93 (CA) (police proposed to use a blood sample obtained legally for a purpose other than that for which it was obtained; the Court rejected an argument that this violated s 21, noting that "seizure" did not refer to the use of something already in the lawful possession of the authorities). See also *Hamed*, above n 106 at [150] per Blanchard J (the essence of a seizure is removing something from the possession of someone else): **ABOA tab 1**, and *Ngan,* above n 59 at [30]-[31] per Blanchard J (rejecting the proposition that items seized for purpose of inventory could not then be used for a criminal prosecution); McGrath J agreeing at [121]: **RBOA tab 10**. The retention and use of information gathered is governed by the Privacy Act 2020.

205 See *In re JR38*, above n 62 at [36] (per Lord Kerr: "Article 8 of the ECHR is, arguably at least, the provision in ECHR with the broadest potential scope of application") and at [86] (per Lord Toulson, quoting Laws LJ with approval: "At the same time it is important that this core right protected by article 8, however protean, should not be read so widely that its claims become unreal and unreasonable"): **RBOA tab 16**.

206 *S and Marper v United Kingdom* [2008] ECHR 30562/04 at [66]: **RBOA tab 27**, citing *Sciacca v Italy* [2005] ECHR 50774/99 at [29].

207 *S and Marper v United Kingdom, ibid* at [67]: **RBOA tab 27**.

208 *Catt (SC),* above n 82 at [4] per Lord Sumption: "there may be some matters about which there is a reasonable expectation of privacy, notwithstanding that they occur in public and are patent to all the world. In this context mere observation cannot, save perhaps in extreme circumstances, engage art 8, but the systematic retention of information may do": **RBOA tab 21**; *Peck v United Kingdom (App no 44647/98)* [2003] ECHR 44647/98 at [59]: **RBOA tab 26** (see also at [57]-[58], citing *PG and JH v UK* [2001] ECHR 44787/98 at [56] ("There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life") and [57] ("A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (e.g. a security guard viewing through close circuit television) is of a similar character. Private life considerations may arise however once any systematic or permanent record comes into existence of such material from the public domain.")

209 *S and Marper v United Kingdom,* above n 207 at [101]-[103]: **RBOA tab 27**.

not suggest otherwise:

93.1 *Wood* concerned quite different (and unusual) circumstances in which after "a few days" there was no realistic possibility the photographs would be relevant to the sole reason for which they were taken ("in case an offence had been committed" at the AGM); there was, moreover, "no more likelihood" that the person photographed would commit a future offence "than any other citizen of good character".[210] By contrast, here there was a reasonable basis to suspect both the commission of an offence and Mr Tamiefuna's connection to such an offence.

93.2 In *Gaughran*, the European Court (disagreeing with the United Kingdom Supreme Court)[211] found Northern Ireland's retention of fingerprints, DNA profiles and photographs taken compulsorily from offenders breached art 8. The focus of the judgment, however, was the *indefinite* retention of such information. This put the State "at the limit of the margin of appreciation" and meant that "the existence and functioning of certain safeguards becomes decisive".[212] The Court found those safeguards deficient. There is nothing in that conclusion, however, which casts doubt on the retention of Mr Tamiefuna's photograph for a short period.

94. The UK Supreme Court's later decision in *Catt* is more instructive. There, the Court found nothing disproportionate in the police retaining, amongst other information, a photograph of Mr Catt for three years.[213] The European Court later emphasised that retention of records relating to Mr Catt was justified "for a period of time",[214] and it did not criticise the requirement to retain such records for a minimum of six years.[215] The Court's art 8 concerns were instead directed to the "absence of effective safeguards" to prevent the disproportionate retention of data

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210 *Wood*, above n 92 at [89] (per Dyson LJ): **ABOA tab 23**.
211 *Gaughran,* above n 61: **RBOA tab 15.**
212 *Gaughran,* above n 61 at [88]: **RBOA tab 15**.
213 *Catt (SC),* above n 82: **RBOA tab 21**. While the European Court of Human Rights disagreed on this point, its concern was the potential indefinite retention of the data, given it was not clear that six-yearly reviews "were conducted in any meaningful way": *Catt (ECHR),* above n 82 at [120]: **RBOA tab 24**.
214 *Catt (ECHR),* above n 82 at [119]: **RBOA tab 24**.
215 At [120].

beyond that point – particularly given the "chilling effect" of retaining data revealing political opinion that attracts a "heightened level of protection".[216]

Section 30 of the Evidence Act 2006

95. In applying s 30 of the Act, the Court of Appeal found:

95.1 While s 21 was an important right, the intrusion in this case was not very serious (s 30(3)(a)).[217] Nor was the breach deliberate, reckless or in bad faith (s 30(3)(b)), given the officer likely would not have realised he was breaching Mr Tamiefuna's rights.[218]

95.2 The photograph had furnished "crucial"[219] real evidence of involvement in a serious offence (s 30(3)(c) and (d)).[220]

95.3 The remaining factors in the balancing test (ss 30(3)(e)-(h)) did not apply.[221]

95.4 While the need for an effective and credible system of justice did not "invariably favour[]" admission, "it clearly does so here given our conclusions about the seriousness of the intrusion and the nature of the impropriety".[222]

96. Mr Tamiefuna says the Court of Appeal unduly weighted factors favouring admission and gave insufficient weight to the breach of his rights.[223] He argues that the rule of law and the long-term repute of the justice system should have led to the evidence being excluded.[224] He proposes a three-stage balancing test, requiring separate consideration of the need for an effective and credible system of justice.[225]

97. On the Crown view, the Court of Appeal decision was an orthodox

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216 At [123].
217 SC COA at 42, Court of Appeal judgment at [100]; see also SC COA at 31, at [70] (describing the intrusion on privacy as "in relative terms, modest").
218 SC COA at 42-43, Court of Appeal judgment at [101]; see also SC COA at 31, at [70].
219 SC COA at 41, Court of Appeal judgment at [98].
220 SC COA at 43, Court of Appeal judgment at [102].
221 SC COA at 43, Court of Appeal judgment at [102].
222 SC COA at 43, Court of Appeal judgment at [103].
223 Appellant's submissions at [7] and [118].
224 Appellant's submissions at [161]-[164].
225 Appellant's submissions at [141]-[143].

application of a test that is now well-settled.

This Court does not need to revisit the s 30 test

98. Section 30 substantially codifies the balancing test for admissibility of improperly obtained evidence developed by the Court of Appeal in *Shaheed*.[226] Under s 30(2)(b), a Judge considering whether to admit improperly obtained evidence must consider:[227]

> whether or not the exclusion of the evidence is proportionate to the impropriety by means of 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.

99. This Court considered s 30 in detail in *Hamed* and has applied it in a number of cases since.[228] The test is well-settled:

99.1 The judge must identify, and weigh, the factors that favour admitting the evidence and those that weigh in favour of exclusion,[229] then consider where the overall balance lies.[230] If the balancing process establishes that exclusion of the evidence would be proportionate to the impropriety, the judge must exclude it: s 30(4).

99.2 The more important the right and the more serious the intrusion on it, the stronger the argument for excluding the evidence (s 30(3)(a)).[231] In s 21 cases, the degree of privacy intrusion will be

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226 *R v Shaheed* [2002] 2 NZLR 377 (CA), **ABOA tab 8.** Section 30 "in large part reproduces the *Shaheed* test in legislation" (*Williams*, above n 121 at [149], and at [8] ("the Evidence Act 2006 effectively enshrines *Shaheed* in legislation"): **ABOA tab 3**; the balancing test mandated by s 30(2)(b) uses "language…borrowed from *Shaheed*" (*Hamed,* above n 106 at [185] per Blanchard J: **ABOA tab 1**, citing *Shaheed* at [156]). See also Ministry of Justice *Initial Briefing on the Evidence Bill* (17 November 2005) at 4 ("[Clause 26] is intended to codify the current law, which was set out by the Court of Appeal in *R v Shaheed*") and Ministry of Justice *Departmental Report for the Justice and Electoral Committee: Evidence Bill* (June 2006) at Part 2 pp 16-18.

227 The word "and" was substituted for the words "but also" to reflect the fact that the need for an effective and credible system of justice does not invariably favour admission, as explained in *Hamed*: *Underwood v R* [2016 NZCA 312, [2017] 2 NZLR 433, **ABOA tab 10,** at [21] fn 25; Evidence Amendment Act 2016, s 10.

228 *R v Kumar* [2015] NZSC 124, [2016] 1 NZLR 204; *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753; *R v Perry* [2016] NZSC 102; *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26; *Alsford*, above n 76. **ABOA tab 7**; *Reti v R* [2020] NZSC 16, [2020] 1 NZLR 108.

229 *Hamed*, above n 106: Blanchard J at [189] ("the most straightforward way to proceed is for the judge to identify and evaluate relevant matters which weigh in favour of exclusion and then those which are against that course. Some may potentially go either way"); Tipping J at [231] ("the ultimate assessment involves striking a balance between the weight of the factors which favour exclusion and the weight of those which favour admission"); McGrath J at [261] ("it is implicit that the court should reach its decision by a process of structured reasoning rather than as a matter of broad impression. In that way, the weight accorded to competing interests will be fairly measured"); Elias CJ at [59] (emphasising "the need for explanation, especially in relation to the commonly recurring (but non-mandatory and non-exhaustive) criteria in s 30(3)"): **ABOA tab 1**. See also *Reti*, above n 228 at [73] ("it is necessary to identify the factors that the court has weighed both for and against the exclusion of evidence.")

230 *Hamed*, above n 106 at [231] (Crown must show that the "overall balance" favours admission): **ABOA tab 1**.

231 *Hamed*, *ibid* at [72] per Elias CJ, [190]–[192] per Blanchard J, [232] per Tipping J, [265] per McGrath J, and [285] per Gault J: **ABOA tab 1**.

central to this analysis.[232] A breach may be aggravated if police carelessly, recklessly or deliberately breached the suspect's rights (s 30(3)(b)),[233] for example if the police knew they could lawfully have obtained the same evidence without breaching rights (s 30(3)(e))[234] – or it may be mitigated by circumstances of urgency or risk to safety (ss 30(3)(g) and (h)),[235] particularly where police had no alternative means of responding to the situation (s 30(3)(e)).[236]

99.3 On the other side of the ledger is the public interest in criminal allegations being determined on their merits.[237] Generally, the more serious the charge[238] and the more reliable the evidence

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232 *Hamed, ibid* at [265] per McGrath J and [285] per Gault J: **ABOA tab 1**; *Williams,* above n 121 at [124]: **ABOA tab 3**.

233 *Shaheed*, above n 226 at [148] ("An action not known to be a breach of rights does not merit the same degree of condemnation as one which is known to be so, particularly if the police error arose from a genuine misunderstanding of a difficult legal complication"): **ABOA tab 8**; *Williams,* above n 121 at [118]-[120]: **ABOA tab 3**. The point is not explicitly discussed in *Hamed* but the judgments which address this factor assume a deliberate breach of rights is usually worse: see Elias CJ at [73], [75], [81]; Blanchard J at [194]; Tipping J at [232]-[235]; McGrath J at [267]: **ABOA tab 1**. Good faith is usually a neutral factor: *Shaheed* at [149]; *Williams* at [121], [130]; *Marwood v Commissioner of Police* [2017] 1 NZLR 260, **ABOA tab 9,** at [71] per Elias CJ (the majority agreeing with these reasons at [50]).

234 *Shaheed*, above n 226 at [150] ("The balance may be more likely to come down in favour of exclusion where other investigatory techniques, not involving any breach of rights, were known to the police to be available and not used. It is of some reassurance to the community where evidence is excluded in such circumstances that, if the same situation arises again, the police do have an available means of obtaining the evidence in a proper way"): **ABOA tab 8**; *Williams* at [127] ("The fact that there were other investigatory techniques available, which were not used, may be classed as police misconduct if there had been a deliberate, reckless or grossly careless decision not to employ those other techniques").

235 *Shaheed*, above n 226 at [147]: **ABOA tab 8**; *Williams,* above n 121 at [123]: **ABOA tab 3**; *Hamed*, above n 106 at [195] (Blanchard J): **ABOA tab 1**.

236 In *Hamed,* above n 106, Elias CJ considered s 30(3)(e) "may pull either way, depending on the context (as for example, where knowledge that there were other investigatory techniques indicates oppressive behaviour, or where, despite such knowledge, there are circumstances of urgency under para (h) or danger under para (g)": at [73]. On the facts of *Hamed,* Blanchard, Tipping and McGrath JJ treated this factor as mitigating the breach: at [195]-[196] per Blanchard J (listing among the factors favouring admission the fact that "[t]he police had no practicable alternative investigatory techniques available to them"), at [246] per Tipping J ("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") and [274] per McGrath J ("Also highly relevant to this consideration, and the reasonableness of the police conduct, is that there were no other practicable means of effective investigation and monitoring of the emerging situation"). Elias CJ considered it was "a significantly exacerbating factor that the film surveillance was undertaken deliberately without legal authority, in the knowledge that there was no lawful investigatory technique available to be used": at [73]. **ABOA tab 1**. In the context of a police interview, the lack of available investigatory techniques was treated as a mitigating factor by the majority in *Chetty*, above n 229 (at [68]).

237 *Hamed*, above n 106 at [188] per Blanchard J, **ABOA tab 1**; *Underwood*, above n 227 at [32]: **ABOA tab 10**; *Grant*, above n 243 at [79] (the Canadian test for exclusion of evidence involves asking "whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion"): **ABOA tab 24**; *Williams*, above n 121 at [134] (the Judge must "balance the breach against public interest factors pointing towards admitting the evidence, such as the seriousness of the offence, the nature and quality of the evidence and the importance of that evidence to the Crown's case"): **ABOA tab 3.**

238 *Underwood*, above n 227 at [41] ("Taken alone, seriousness favours admission"): **ABOA tab 10**; *Shaheed*, above n 226 at [143] and [152]: **ABOA tab 8**; Williams, above n 121 at [138] ("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 (see *Shaheed* at [152]). The public might justifiably think it too great a price to pay for evidence, which is reliable, highly probative and central to the Crown case, to be excluded in such cases"): **ABOA tab 3**. See also *W (CA597/2016) v R* [2017] NZCA 522 at [46] ("The general principle is that seriousness generally, but not always, favours inclusion").

discovered,[239] the stronger the case for admission, particularly if the evidence is crucial to the prosecution case (ss 30(3)(c) and (d)).[240]

100. Sometimes, however, the longer-term impact of admitting improperly obtained evidence will favour its exclusion even though this will impede truth-seeking in the individual case. An "effective and credible system of justice" demands not only that offenders be brought to justice, but also that police impropriety should not too readily be condoned by admitting unlawfully obtained evidence.[241] Thus serious alleged offending can "cut both ways",[242] as a majority of the Supreme Court of Canada explained in *Grant*:[243]

> [W]hile 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 where the penal stakes for the accused are high.

101. At one end of the spectrum, therefore, a grave or deliberate breach of rights may effectively compel exclusion.[244] At the other end, where reliable

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239 *Williams*, above n 121 at [140] ("The more cogent the evidence, the more likely it is that the accused committed the crime and the stronger the public interest in conviction") and [250](b) ("The more probative, reliable and crucial the evidence is, the more likely it is that the public interest in the conviction of criminals might outweigh the breach of rights. Conversely, where there is a significant issue of unreliability because of the breach, the balancing test would come down in favour of exclusion"): **ABOA tab 3**; *Shaheed,* above n 226 at [152] ("[t]he more probative and crucial the evidence, the stronger the case for inclusion…"): **ABOA tab 8**; *Hamed*, above n 106 at [80] per Elias CJ, at [201] per Blanchard J, at [236] per Tipping J, and at [276] per McGrath J: **ABOA tab 1**.

240 *Williams*, above n 121 at [141]: **ABOA tab 3**; *Hamed*, above n 106 at [201] per Blanchard J: citing *Grant*, above n 243 at [83] and [226]: **ABOA tab 24**, and at [276] of *Hamed* per McGrath J ("Although not a specific s 30(3) consideration, the centrality of the evidence to the prosecution also goes to its quality and is relevant to the balancing exercise"); see also at [260] (the legislative history "does not preclude consideration of this factor where it is relevant in the balancing exercise".) Tipping J considered Parliament had deliberately decided against this factor being relevant (at [237]): **ABOA tab 1**. The Court of Appeal has since treated as relevant the importance of the evidence to the prosecution case: see for example *T (CA438/2015) v R* [2016] NZCA 148 at [71] (see also the cases cited at [68] fn 71), and *Butland v R* [2019] NZCA 376 at [60].

241 *Hamed*, above n 106 at [60]-[61] per Elias CJ, [187] per Blanchard J, [258] per McGrath J and [229]-[230] per Tipping J: **ABOA tab 1**. A justice system would not command public respect if it allowed ends to justify *any* means: *Shaheed,* above n 226 at [148] per Richardson P, Blanchard and Tipping JJ (speaking of serious NZBORA breaches that were deliberate, reckless or grossly careless: "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.") **ABOA tab 8.** See also *Williams*, above n 121 at [146]: **ABOA tab 3**; *Hamed*, at [61] per Elias CJ ("Public confidence in the effectiveness and credibility of the "system of justice" suggests a wider concern than with the outcome in a particular case") and at [229] per Tipping J ("[Section 30's] 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"); and *Grant,* above n 243 at [68] ("Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s 24(2) [of the Charter] does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence.") **ABOA tab 24.**

242 *Hamed*, above n 106 at [65] per Elias CJ, at [187] per Blanchard J, at [230] per Tipping J: **ABOA tab 1**; *Underwood*, above n 227 at [38]-[41]: **ABOA tab 10**; *R v Reti,* above n 228 at [90]; *R v Chetty*, above n 229 at [67].

243 *Grant v R* [2009] 2 SCR 353 at [84], **ABOA tab 24**. Deschamps J (dissenting) considered this factor less equivocal, holding that the more serious the crime, the greater the public interest in its prosecution: at [222] and [226]. See also *Collins v R* [1987] 1 SCR 265: **RBOA tab 28**.

244 *Shaheed*, above n 226 at [148] ("Exclusion will often be the only appropriate response where a serious breach has been committed deliberately or in reckless disregard of the accused's [NZBORA] rights or where the police conduct in relation to that breach has been grossly careless"): **ABOA tab 8**; *Williams,* above n 121 at [145] (majority) ("if the illegality or unreasonableness is serious, the nature of the privacy interest strong, and the seriousness of the breach has not been diminished by any mitigating factors…, then any balancing exercise would normally lead to the exclusion of the evidence, even where the crime was serious"): **ABOA tab 3**.

evidence of culpable offending is discovered without any serious breach of rights, the scales will tilt towards admitting the evidence.[245]

There is no evidence that s 30 is being misapplied

102. Mr Tamiefuna suggests, based on a selection of Court of Appeal decisions applying s 30, that the outcome in his case reflects a wider problem: too much improperly obtained evidence is now being admitted.

103. It would, however, be unsafe to draw such a conclusion. First, not all of s 30's influence is captured in judicial decisions; prosecutors can be expected not to seek to lead improperly obtained evidence where exclusion is likely. Second, most s 30 decisions are unpublished judgments made by trial courts; appeal decisions represent only a small – and non-representative – subset. Third, given the vast majority of appeals involve defendants challenging a decision to *admit* evidence, a success rate of around 20 per cent simply suggests a low rate of first-instance error – and at a rate not dissimilar to that at which all defendant appeals are allowed.[246] Fourth, only cases involving search and seizure have been analysed. Such cases are likely to concern evidence that is real, reliable and central to the prosecution, all factors that favour admission.[247] Fifth, given the Court of Appeal's responsibility for supervising the jury trial jurisdiction, the cases that reach it will generally involve more serious offending. This too generally favours admission.

104. Nor can the influence of individual s 30 factors be considered in isolation – for example, by simply counting the cases in which s 30(3)(d) was in play, then reasoning backwards from a decision to exclude to conclude that this factor is being given "overwhelming" weight.[248] This approach assumes, wrongly, that s 30(3) factors are binary in nature (present/not) and that

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245 *Shaheed*, above n 226 at [152] ("[t]he more probative and crucial the evidence, the stronger the case for inclusion…if the evidence is less significant there is less reason to admit it in the face of a more than a trivial breach of rights. If, however, the crime was very serious, particularly if public safety is a concern, that factor coupled with the importance of the evidence in question may outweigh even a substantial breach."): **ABOA tab 8**; *Williams,* above n 121 at [144] (majority) ("where a breach is minor, the balancing exercise would often lead to evidence being admissible where the crime is serious and the evidence is reliable, highly probative and crucial to the prosecution case") and at [252] ("The reliability and probative value of the evidence will often outweigh a minor breach where the crime is of a serious nature.") **ABOA tab 3.**

246 When all criminal appeals are considered, defendants succeeded 28% of the time in 2023: Crown Law *Pūrongo ā-tau | Annual Report 2022/2023 (2023)* at 31.

247 A survey of the proportion of statements ruled admissible despite being obtained in breach of s 23(4) of NZBORA might well produce quite different results.

248 Appellant's submissions at [113].

their influence on admissibility can be assessed in isolation from one another. All the factors exist along a spectrum; as Tipping J noted in *Hamed*, "the question is not whether the offence charged is serious, but rather how serious the offence charged is".[249] Further, what matters is the combined weight of all relevant factors, both for and against admission; and because the inquiry is proportionality (not whether some objective threshold is met), an individual factor's influence on the outcome will always depend on what falls to be weighed against it.

105. The appellant's analysis therefore does not demonstrate that s 30 is being misapplied. And even if wholesale reform of the s 30 test – of the kind the Law Commission is currently considering[250] – were needed, Mr Tamiefuna's would not be the case in which to consider it.

A three-step test would not alter the analysis

106. Mr Tamiefuna suggests judges should give separate analysis to the need for an effective and credible system of justice, in particular the long-term impact of admitting improperly obtained evidence. After first deciding whether exclusion of improperly obtained evidence is proportionate to the impropriety, judges should then go on to consider whether this outcome is "consistent with the need for an effective and credible system of justice".[251]

107. But the need for an effective and credible system of justice is already part and parcel of the s 30 balancing test. When a judge decides that serious offending favours admission, she is giving weight to the public interest in having the truth of criminal allegations determined at a trial.[252] If the judge nevertheless concludes that the breach was so grave that exclusion must follow, she is deciding that admission would cause harm to the long-term interests of the justice system that outweighs the interests of truth-seeking

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249 *Hamed*, above n 106 at [241] per Tipping J (adding that "[s]eriousness, in context, is not an absolute concept; it is a comparative one.") **ABOA tab 1**.

250 Law Commission *Third Review of the Evidence Act* (NZLC IP50, May 2023, Wellington), Chapter 7, **ABOA tab 29**.

251 Appellant's submissions, at [141]-[143].

252 *Hamed*, above n 106 at [206] per Blanchard J: "If the evidence were to be excluded against these appellants and they were then not to face trial, that public interest would be defeated, with consequent adverse reflection on the effectiveness and credibility of the justice system." **ABOA tab 1**. See also *Reti,* above n 228 at [92].

in the instant case.[253] At both points, the judge is considering the need for an effective and credible system of justice – whether she says so explicitly or not.

108. This being so, it is hard to see how a three-step test would have altered the outcome in Mr Tamiefuna's case. In any case, the Court of Appeal noted an effective and credible system of justice may favour exclusion but considered – correctly – that this was not such a case: it had no features that might prove corrosive of the justice system long-term (such as serious breach, deliberate misconduct, or unreliable evidence).

The evidence was properly admitted

109. In Mr Tamiefuna's case, the s 30 test favoured admitting the photograph. As the Court of Appeal noted, it furnished "crucial"[254] and reliable evidence linking Mr Tamiefuna to a serious offence[255] – one that involved two men breaking into the 68-year-old victim's home, entering his bedroom as he slept, assaulting him, taking his phone and camera, and stealing a car worth $47,000.[256] The victim, who lives alone, has been left traumatised, unable to sleep, and anxious and on-edge in his own home.[257] Any intrusion on Mr Tamiefuna's privacy was extremely limited; he was photographed in public without compulsion,[258] and the officer believed, reasonably, that he was acting lawfully.[259] The public might justifiably think Mr Tamiefuna's acquittal too high a price to pay to vindicate any minimal breach of his privacy.

Summary

110. It was neither unlawful nor unreasonable for the police to photograph Mr Tamiefuna on 5 November 2019. However, even if it were improperly obtained, exclusion would have been disproportionate to any impropriety. The photograph was properly admitted in evidence. The appeal should

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253 *Hamed*, above n 106 at [251] per Tipping J: holding that on the facts, there was "too great a risk of seriously undermining the rule of law to allow the short term to predominate in any decisive way." **ABOA tab 1**. See also *Reti,* above n 228 at [94].

254 SC COA at 41, Court of Appeal judgment at [98].

255 In *Kalekale v R* [2016] NZCA 259, the Court of Appeal described three aggravated robberies (of petrol stations and a dairy) as constituting "very serious" offending under s 30(3)(d): at [40] and [41].

256 SC COA at 43, Court of Appeal judgment at [102]; Sentencing notes at [4]-[5], SC COA vol 2 at 73.

257 CA COA (Victim Impact Statements) at 3; CA COA at 97, Sentencing notes at [7].

258 SC COA at 42, Court of Appeal judgment at [100]; see also at 31, at [70] (describing the intrusion on privacy as "modest").

259 SC COA at 42-43, Court of Appeal judgment at [101]; see also at 31, at [70].

accordingly be dismissed.

20 February 2024

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P D Marshall | A J Ewing
Counsel for the respondent

TO: The Registrar of the Supreme Court of New Zealand.

AND TO: The appellant.

AND TO: The Privacy Commissioner.