IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

CRI-2015-442-000011
[2015] NZHC 1096

THE QUEEN

v

TAYLOR IVAN ANTONIEVIC
NATALIE JEAN BUSCH
GRANT ROY HAYWARD
TERRY JONES
GLYN PATRICK RUTLEDGE
ROBERT JOHN STEWART
GLEN ROSS THOMPSON

Hearing:	4 May 2015
Counsel:	J M Webber for Crown K W Jones (acting on instructions from Mr S J Zindel) for Defendant Antonievic No appearance required for Defendant Busch C P Stevenson and T H A Spear for Defendant Hayward R M Lithgow QC and A J D Bamford for Defendant Jones J C S Sandston for Defendant Rutledge No appearance required for Defendant Stewart C W J Stevenson for Defendant Thompson
Judgment:	21 May 2015

JUDGMENT OF COLLINS J
[Applications for Stay of Proceedings]

Summary of judgment

[1] All remaining charges based upon evidence obtained after 1 June 2010 are stayed because allowing the trials to continue would undermine public confidence in the integrity of the criminal justice system.[1]

[2] The small number of remaining charges based upon evidence which pre-date 1 June 2010 are not stayed. The Crown will need to determine whether it wishes to proceed with those charges.

Context

[3] The defendants' applications to stay all remaining charges arise in the context of five judgments of the High Court and Court of Appeal.

[4] First, in *R v Antonievic*, Simon France J stayed all charges because of his concerns over significant misconduct engaged in by the police when undertaking an undercover investigation into the defendants.[2] I will refer to that misconduct as the "false warrant and prosecution scenario".

[5] Second, the Court of Appeal allowed the Crown's appeal and reinstated the charges.[3] A key element in the Court of Appeal's reasons for allowing the appeal was the Court of Appeal's understanding there was no connection between the false warrant and prosecution scenario and the evidence obtained by the police to support the charges.

[6] Third, on 20 February 2015 I ruled that on the basis of the evidence presented to me, there was a connection between the false warrant and prosecution scenario and evidence gathered by the police after the commencement of that scenario on 1 June 2010. I ruled that the evidence in relation to all but the "serious" charges that

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1 *R v Antonievic* [2013] NZCA 483, [2013] 3 NZLR 806 at [48]; *Beckham v R* [2012] NZCA 603, [2013] 1 NZLR 613 at [43]; *R v Maxwell* [2010] UKSC 48, [2011] 1 WLR 1837 at [13]; *Warren v Attorney-General for Jersey* [2011] UKPC 10, [2012] 1 AC 22 at [22].

2 *R v Antonievic* [2012] NZHC 2686.

3 *R v Antonievic* [2013] NZCA 483, [2013] 3 NZLR 806.

post-dated 1 June 2010 was excluded under s 30 of the Evidence Act 2006 (Evidence Act).[4] The Crown did not appeal that decision.

[7] Fourth, on 11 March 2015 I identified what I believed were the "serious" charges.[5] I ruled that a total of 31 charges against eight defendants were serious. The Crown appealed my finding that 18 charges against three of those eight defendants were not serious.

[8] Fifth, on 2 April 2015 I granted applications brought pursuant to s 347 of the Crimes Act 1961 (Crimes Act) in relation to 116 of the charges which I had ruled were not serious and which were not the subject of the Crown's appeal. The Crown did not oppose the orders I made under s 347 of the Crimes Act.[6]

Background

[9] The background to these proceedings has been fully traversed in the earlier judgments. I will therefore only briefly summarise the background. The more detailed descriptions of the background contained in my earlier judgments should be read as part of this judgment.[7]

[10] The defendants are members or associates of the Red Devils Motorcycle Club in Nelson (the Red Devils).

[11] In September 2009, the police commenced an inquiry into the Red Devils because of concerns the defendants were engaged in serious criminal offending and because of concerns that the Hell's Angels were involved with the Red Devils in Nelson.

[12] The police investigations involved two distinct phases. One phase, called "Operation Explorer", involved covert surveillance of the Red Devils. The techniques used in Operation Explorer did not enable the police to gather all the

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4 *R v Antonievic* [2015] NZHC 230.
5 *R v Antonievic (No 2)* [2015] NZHC 439.
6 *R v Antonievic* [2015] NZHC 679.
7 My earlier judgments examine the evidence and therefore remain subject to public suppression orders until the final disposition of the trial.

evidence they needed to charge the defendants. This led the police to decide in November 2009 to embed two undercover officers into the Red Devils. This phase of the police operation was called "Operation Holy".

[13] One of the undercover officers was Constable "Michael Wilson" (Mr "Wilson"). The other undercover officer was Constable "Kasey Robinson" (Ms "Robinson"). They posed as a couple and slowly infiltrated the Red Devils.

[14] Mr "Wilson" and Ms "Robinson" reported to their senior officers, who included Detective Senior Sergeant Olsson and Detective Sergeant Mackie, who are members of the Covert Operations Unit of the New Zealand Police. Detectives Olsson and Mackie reported to their superiors within the Organised and Financial Crime Agency of New Zealand (OFCANZ). Detective Inspector Wormald, a senior member of OFCANZ, had overall responsibility for Operation Explorer.

[15] The undercover activities of Mr "Wilson" and Ms "Robinson" were inherently risky. The police believed the safety of Mr "Wilson" and Ms "Robinson" could be compromised if some members of the Red Devils knew their true identities.

[16] Mr Mike Tulouna was one of the key points of contact between Mr "Wilson" and the Red Devils. Mr Tulouna was a prospective member of the Red Devils and was well known to the police. He had 81 criminal convictions and had a reputation for "intimidating behaviour and stand-over tactics".[8] As Mr Tulouna died approximately 10 months after the termination of Operations Explorer and Holy, he is no longer a defendant.

[17] In early May 2010, Mr Tulouna questioned Mr "Wilson" about how he earned his money. Mr Tulouna told Mr "Wilson" the Red Devils were seeking assurance that Mr "Wilson" was not an undercover police officer.[9]

[18] Soon after this incident Mr "Wilson" involved Mr Tulouna in an illegal paua selling operation. This scenario was designed to reassure Mr Tulouna and members of the Red Devils that Mr "Wilson" was genuinely involved in criminal activity.

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8 Application by Detective Inspector J F Winter for an interception warrant, 7 May 2010 at 27-28.

9 Brief of Evidence, J R Mackie, 29 June 2012 at [32].

[19] On 21 May 2010, police learnt that "word [was] going around Motueka that there [were] two agents in town. Their names are Kasey and Mike".[10] This information was an obvious source of concern for the police. In order to protect the true identities of Mr "Wilson" and Ms "Robinson" and to ensure that Operation Holy could continue to provide the police with evidence against the defendants, the false warrant and prosecution scenario was created.

[20] I have explained the details of the false warrant and prosecution scenario in paragraphs [30] to [40] of my judgment of 20 February 2015. For convenience I will now repeat the contents of those paragraphs in this judgment.

[21] The scenario involved Mr "Wilson" renting a storage unit from a person who owned and ran a storage facility in Motueka. At the time police erroneously thought the owner of the storage facility was connected to the Red Devils.

[22] The police placed apparently "stolen" laptops, ammunition and equipment consistent with cannabis offending in the storage unit. The police then prepared a fictitious search warrant that was signed by a police officer in the place on the warrant reserved for the signature of a Court Registrar/Judicial Officer.

[23] On 27 May 2010 the police showed the "search warrant" to the owner of the storage facility and persuaded the owner of the storage facility to allow them into the premises and to search the unit "rented" by Mr "Wilson". The police seized the planted "stolen" items in the rental unit. Later that day a "warrant" to arrest Mr "Wilson" was issued by the police.

[24] On 29 May 2010, Mr "Wilson" was stopped by police leaving the Red Devils clubrooms in Nelson. Mr "Wilson" was arrested and taken to the Nelson Police Station where he was fingerprinted, photographed and released to appear in the Nelson District Court on 14 June 2010 on a charge which alleged he had committed an offence under the Misuse of Drugs Act 1975.

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10 New Zealand Police, Phase Report, Operation Holy, 21 May 2010.

[25] When Mr "Wilson" appeared in the Nelson District Court on 14 June 2010 he was remanded at large without plea until 5 July 2010. He received a "disclosure package" from the police which he showed to Mr Tulouna.

[26] Mr "Wilson" appeared in the Nelson District Court on 5 July 2010 and was remanded until 20 July 2010. He was then remanded to 16 September 2010. Mr "Wilson" failed to appear in the Nelson District Court on 16 September 2010. This caused a warrant for his arrest to be issued by the District Court.

[27] Mr "Wilson" made a voluntary appearance in the Nelson District Court on 21 September 2010. He was further remanded on bail to 11 November 2010.

[28] Mr "Wilson" did not appear in the Nelson District Court on 11 November 2010. A further warrant for his arrest was issued. On 15 November 2010 Detective Senior Sergeant Olsson directed the police prosecutor to withdraw the latest warrant to arrest Mr "Wilson" for failing to appear in the Nelson District Court. Detective Senior Sergeant Olsson took this step in order to ensure Mr "Wilson" was not subjected to overly restrictive bail conditions or detained in custody. Mr "Wilson" made a further voluntary appearance in the Nelson District Court on 19 November 2010. Mr "Wilson" appeared in the Nelson District Court on 25 January 2011 for a "status hearing".

[29] Mr "Wilson's" multiple appearances and failures to appear in the Nelson District Court were all designed to increase his credibility with the defendants.

[30] Ultimately the charges against Mr "Wilson" were withdrawn on 22 March 2011 after the termination of Operations Explorer and Holy.

[31] For completeness I record that on 31 May 2010 Detective Sergeant Olsson and Detective Superintendent Drew, then the most senior detective in the New Zealand Police, met with the then Chief District Court Judge who has since died. The police believed that the Chief District Court Judge approved of the

scenario which involved Mr "Wilson" appearing in the Nelson District Court on charges that had been created by the police as part of the false warrant and prosecution scenario.

Termination of Operations Explorer and Holy

[32] Operations Explorer and Holy were terminated in March 2011 following which 21 defendants were charged with a total of 148 offences.

[33] I have analysed the charges faced by the defendants in my judgment of 11 March 2015. For present purposes I note the charges included a variety of drug offences, such as the possession and supply of methamphetamine, LSD and cannabis. Ten defendants were charged with participating in an organised criminal group. Some defendants were charged with unlawful possession and supply of firearms and three were charged with conspiracy to commit arson. Seven defendants were charged with conspiring to commit grievous bodily harm to Mr Tulouna when they allegedly agreed to "smash his legs" if he did not stop causing problems for the Red Devils. Some defendants were charged with comparatively minor dishonesty offences, such as stealing quantities of meat and dairy products and stealing petrol from a service station.

[34] Four of the remaining charges relate to events that pre-dated the false warrant and prosecution scenario.

Significance of the false warrant and prosecution scenario

[35] In my judgment of 20 February 2015, I analysed the evidence presented to me, which led me to conclude that the false warrant and prosecution scenario was pivotal to the police gathering evidence against the defendants in relation to the charges that post-date the commencement of the scenario on 1 June 2010.[11] The Crown have not appealed those findings. Mr Webber, counsel for the Crown, acknowledged that for the purposes of considering the stay applications I am entitled

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[11] *R v Antonievic* [2015] NZHC 230.

to assume that the Crown does not challenge the factual findings in my judgment of 20 February 2015.

[36] The following four points formed part of the reasons why I concluded there was a connection between the false warrant and prosecution scenario and the obtaining of evidence by the police after the commencement of that scenario.

[37] First, the defendants were well organised and experienced in the world of criminal offending. They were wary of "outsiders" and knew it was possible the police might try to infiltrate their organisation through use of undercover police officers.

[38] Second, the evidence before me established the false warrant and prosecution scenario allayed any suspicions the defendants had about Mr "Wilson" and Ms "Robinson".

[39] Third, the evidence gathered by Mr "Wilson" after the false warrant and prosecution scenario was initiated provided an important foundation for a number of the charges brought against the defendants. The police summaries of facts showed Mr "Wilson" was able to participate in and observe criminal offending from 1 June 2010 because the defendants did not suspect he was an undercover police officer. Detective Inspector Wormald also drew particular attention to the organised criminal group charges as examples of the charges that were based on Mr "Wilson's" observations that he only could have made while he held the confidence of the defendants.

[40] Fourth, had the defendants learnt the true identities of Mr "Wilson" and Ms "Robinson", they would have realised the police were monitoring their activities. The Red Devils would either have suspended their criminal activities or taken steps to minimise further the prospects of their offending being detected.

First stay applications

[41] Simon France J heard the first applications brought by all defendants in July 2011 to have all charges stayed on the grounds that the false warrant and prosecution

scenario was so contrary to acceptable police practices that allowing the trial to continue would amount to an abuse of process.[12]

[42] Simon France J concluded that the false warrant and prosecution scenario was an abuse of the Court's process. He described the police conduct as "a fraud … committed on the Courts".[13] Simon France J reached the conclusion that while the police officers did not act in bad faith, they acted with "a significant measure of recklessness".[14]

[43] Simon France J did not have the benefit of all of the evidence that was presented to me when I delivered my judgment of 20 February 2015. He recorded that he was "not convinced by the efforts of the defendants' counsel to establish a connection" between the false warrant and prosecution scenario and the evidence which formed the basis for the prosecutions.[15]

[44] Simon France J was so concerned about the false warrant and prosecution scenario that he believed the only appropriate course was for him to order a stay of all the charges against all defendants.

[45] The Court of Appeal agreed with the factual findings made by Simon France J, but concluded he had erred in law by focusing on the police misconduct rather than whether allowing the defendants' trial to continue would be an abuse of the processes of the High Court.

[46] The Court of Appeal took into account:[16]

> … the fact that, as [Simon France J] correctly noted, there is no strong causal link between the misconduct and the evidence underlying the charges that have been laid against the respondents. There is no "but for" element in this case …

[47] In reaching its conclusion that the appropriate outcome was to set aside the order staying the proceedings, the Court of Appeal said:[17]

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12 *R v Antonievic*, above n 2.
13 At [45].
14 At [32]-[33] and [50].
15 At [69].
16 *R v Antonievic*, above n 3, at [107].

> We conclude that, although the police misconduct in the present case was grave and, itself, involved an abuse of the Court's process, the trial of the respondents would not involve the Court condoning that conduct and would not involve the Court accepting evidence obtained as a result of that misconduct.
>
> While the granting of a stay would have the substantial benefit of providing a clear condemnation by the Court of the police conduct and a clear signal that the Court does not accept that the ends justify the means, we do not see those factors as sufficiently strong to outweigh the public interest in bringing the respondents to trial.
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> We do not believe that by allowing the trial to proceed, the Court could fairly be seen to be condoning the police conduct. While we acknowledge that the case is finely balanced because of the seriousness of the police conduct, we see the balancing exercise as favouring the refusal of a stay in the present case so that the respondents face trial for the offences of which they stand accused.

Exclusion of evidence

[48] My judgments of 20 February 2015 and 11 March 2015 dealt with the defendants' applications under s 30 of the Evidence Act to exclude evidence obtained as a result of the false warrant and prosecution scenario.

[49] When determining those applications, I had the benefit of evidence that had not been placed before Simon France J or the Court of Appeal. In particular, I had the advantage of evidence from Detective Inspector Wormald and further evidence from Detective Sergeant Mackie. I also had the opportunity to undertake an analysis of the police summaries of facts, the veracity of which have now been confirmed by Mr "Wilson" in an affidavit sworn for the purposes of the present proceeding. That additional evidence led me to the conclusions I have summarised in paragraphs [35] to [40] of this judgment.

[50] In my judgment of 20 February 2015, I concluded all evidence obtained by the police after the commencement of the false warrant and prosecution scenario had been improperly obtained and should be excluded other than evidence that was relied upon by the Crown to support the "serious" charges.

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[17] *R v Antonievic*, above n 3, at [115]-[117].

[51] The exclusion of all evidence except in relation to the "serious" charges reflected the provisions of s 30(3)(d) of the Evidence Act, which provides when determining if the exclusion of evidence is proportionate to the established impropriety, the Court may have regard to a number of matters including "the seriousness of the offence with which the defendant is charged".

[52] I observed that:[18]

> … Allowing the production of evidence of serious criminal offending, even in circumstances where that evidence has been improperly obtained, recognises the public interest of ensuring those who commit serious crimes are tried. There is a correlation between the seriousness of alleged offending and the likelihood of evidence being admissible in relation to that offending.

[53] In reaching my conclusion I explained that I was:[19]

> … satisfied, albeit by a very fine margin, that the evidence in relation to any serious charges should not be excluded. In my assessment, it is in the overall interests of society that the defendants who are charged with serious offences should be brought to justice notwithstanding the grave impropriety on the part of the police in this case. This conclusion is consistent with an effective and credible system of justice which requires those charged with serious offending to be tried, even when, as in this case, the evidence against them has been obtained improperly.

Principles governing stay applications

[54] The principles governing an application to stay criminal proceedings in order to uphold public confidence in the integrity of the criminal justice system were helpfully summarised by the Court of Appeal in this proceeding.[20]

[55] The principles articulated by the Court of Appeal relevant to the present stay applications can be distilled to the following four points.

[56] First, a stay application is prospective:[21]

> … the focus of the inquiry needs to be on the proposed trial in respect of which the stay is sought. To that extent … the fact that the impugned

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18 *R v Antonievic*, above n 4, at [113].
19 At [124].
20 *R v Antonievic*, above n 3.
21 *R v Antonievic*, above n 3, at [93], adopting *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA).

> conduct is, itself, an abuse of the Court's process will not be decisive: the Court must ask itself whether the proposed trial will be an abuse of process.

[57] Second, the strength of any causal connection between the impugned conduct is relevant, but not a "pre-condition for a stay":[22]

> While a "but for" linkage is not necessary for a stay to be granted, the weaker the linkage the weaker the case will be for a stay.

[58] Third, the ultimate question:[23]

> … is always whether all the circumstances specific to the particular case, including but not limited to the misconduct, lead to the conclusion that proceeding with the trial of the accused for the offence charged offends the court's sense of justice and propriety or that public confidence in the criminal justice system would be undermined by proceeding with it or whether, conversely, it is in the interests of justice that, notwithstanding the misconduct, the accused be tried …

[59] Fourth, the decision to be made involves a balancing exercise:[24]

> ... between the need to protect the Court's processes from abuse against the public interest in seeing criminal charges being determined on their merits. This is evaluated in relation to the future trial, and the question is whether allowing that trial to proceed in the light of the misconduct will affect public confidence in the criminal justice system …

Distinction between excluding evidence and staying proceedings

[60] Decisions to exclude evidence under s 30 of the Evidence Act involve balancing the weight of the established impropriety with the need for an effective and credible system of justice. This may involve consideration of the interests of society in seeing defendants charged with serious offences brought to justice, notwithstanding the prosecution's reliance upon improperly obtained evidence.

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22 *R v Antonievic*, above n 3, at [77] and [94], adopting *Secretary of State for the Home Department v CC* [2012] EWHC (Admin) 2837, [2013] 1 WLR 2171.

23 *R v Antonievic*, above n 3, at [91], citing *Hong Kong v Wong Hung Ki* [2010] HKCA 135, [2010] 4 HKC 118 at [104].

24 *R v Antonievic*, above n 3, at [102].

[61] As the Supreme Court explained in *Hamed v R*:[25]

> … By enacting s 30 Parliament has indicated that in appropriate cases improperly obtained evidence should be admitted, but the longer-term effect of doing so on an effective and credible system of justice must always be considered, as well as what may be seen as the desirability of having the immediate trial take place on the basis of all relevant and reliable evidence, despite its provenance …

[62] Issues about wider implications upon the administration of justice and allowing improperly obtained evidence are relevant considerations under s 30 of the Evidence Act. However, applications under s 30 of the Evidence Act also require careful consideration of whether in a particular case the interests of justice are served by allowing the improperly obtained evidence to be produced. In a decision under s 30 of the Evidence Act there is a strong focus on ensuring justice between the parties in the case before the Court. On the other hand, stay applications have a far broader focus upon the recognised wider purposes of the administration of justice which may transcend an individual case.

[63] While there is undoubtedly a degree of overlap between applications to exclude evidence and stay applications, the primary focus of these two types of applications is not the same. This is why the factors which need to be considered in relation to each type of application may have elements in common, but the weight or emphasis that applies to those factors may not necessarily coincide. The seriousness of the charges is a factor that may influence an application to exclude evidence on the basis that evidence is less likely to be excluded in serious cases. This consideration does not appear to receive the same weight in stay applications.

[64] I have proceeded on the basis that when enacting s 30(3)(d) of the Evidence Act, Parliament decided the seriousness of the offending weighs against exclusion of improperly obtained evidence. In saying this, I appreciate that in *Hamed* some Judges indicated a contrary view. Elias CJ said:[26]

> … It cannot be the case that [the seriousness of the offence] always prompts admission of the evidence obtained in breach of the New Zealand Bill of Rights Act where offending is serious. That would be to treat human rights,

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25 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [230] per Tipping J, see also Elias CJ at [58], Blanchard J at [187] and McGrath J at [258].

26 At [65].

> which are expressed as universal, as withdrawn from those charged with serious offending …

[65] My understanding of the purpose of s 30(3)(d) of the Evidence Act is that it aims to give primacy to the desire to bring the most serious offenders to trial. The same weight is not necessarily given to the seriousness of alleged offending when a Court considers a stay application. This reflects the primacy in stay applications upon maintaining a criminal justice system that is above reproach, particularly when the stakes for a defendant are high.

[66] My understanding of the law reflects the way stay applications have been decided in cognate jurisdictions. For example, the Court of Appeal of England and Wales in *R v Grant* allowed an appeal against conviction on a charge of conspiracy to murder.[27] The stay application was declined at first instance even though it was established the police had deliberately recorded privileged conversations that took place between the defendant and his solicitor in a police station. The Court of Appeal allowed the appeal on the basis that the misconduct of the police was so grave that the proceeding should have been stayed in order to protect public confidence in the criminal justice system. Similarly, in *R v Maxwell*, the appellant's convictions for murder and robbery were quashed on appeal by the United Kingdom Supreme Court after it emerged that the police had misled the trial Court by concealing and lying about various benefits that the main prosecution witness had received in exchange for giving evidence.[28]

[67] These two cases illustrate stays may be granted in cases where the charges are very serious to address grave misconduct on the part of the police in order to protect public confidence in the criminal justice system.

Analysis

The impugned conduct

[68] The false warrant and prosecution scenario involved the police engaging in significant misconduct. I have previously suggested the police officers who forged

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[27] *R v Grant* [2005] EWCA Crim 1089, [2006] QB 60.
[28] *R v Maxwell*, above n 1.

the signature of a judicial officer on the "search warrant" and the police officer who signed the fictitious information charging Mr "Wilson" probably committed offences under s 18 of the Summary Offences Act 1981,[29] and/or s 110 of the Crimes Act.[30] Mr "Wilson" also probably breached what was then s 37 of the Bail Act 2000 when he failed to answer bail on 11 November 2010.[31]

[69] Mr Lithgow QC, senior counsel for Mr Jones, suggested the police may also have perverted the course of justice when engaging in the false warrant and prosecution scenario.[32] Mr Webber did not challenge the suggestion that the police conduct may have amounted to serious criminal offending.

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[29] **18 Imitation of Court documents**

(1) Every person is liable to a fine not exceeding $500 who sends or delivers or causes to be sent or delivered to any other person any document that is intended or is likely, by reason of its wording or appearance or in any other manner, to cause any person to believe, contrary to the fact, that—

(a) The document has been issued by or with the authority of a Court or Judge or Justice or Community Magistrate, or an officer of a Court; or

(b) The issue or delivery of the document has any legal effect or operation as a step or process in or preliminary to any civil or criminal proceedings.

(2) Every person is liable to a fine not exceeding $500 who prints or sells or offers for sale any printed form of document intended to be filled up and used as a document the delivery of which to any person would constitute an offence against subsection (1) of this section.

(3) It is no defence in a prosecution under this section that—

(a) The person who received the document was not actually deceived by it; or

(b) The document does not purport to be any summons, notice, or other document—

(i) That any actual Court or Judge or Justice or Community Magistrate, or any officer of a Court, has authority to issue; or

(ii) The issue of which has any legal effect or operation of a kind referred to in subsection (1) of this section.

[30] **110 False oaths**

Every one is liable to imprisonment for a term not exceeding 5 years who, being required or authorised by law to make any statement on oath or affirmation, thereupon makes a statement that would amount to perjury if made in a judicial proceeding.

[31] Now s 38 of the Bail Act 2000. Section 37 of the Bail Act 2000 as it applied at the time provided:

37 Failure to answer bail

A defendant commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 1 year or a fine not exceeding $2,000 who, having been released on bail by a District Court or Registrar,–

(a) fails without reasonable excuse to attend personally at the time and the court specified in the notice of bail; or

(b) fails without reasonable excuse to attend personally at any time and place to which during the course of the proceedings the hearing has been adjourned; or

(c) fails without reasonable excuse to comply with any condition imposed under section 39A(3).

[32] **117 Corrupting Juries and witnesses**

Every one is liable to imprisonment for a term not exceeding 7 years who—

…

(e) wilfully attempts … to obstruct, prevent, pervert, or defeat the course of justice in New Zealand or the course of justice in an overseas jurisdiction.

[70] Senior police officers devised the false warrant and prosecution scenario because they believed the ends justified their means. Had a private prosecutor engaged in similar tactics he or she could expect to face the full wrath of the criminal justice system. These observations are made solely to emphasise the seriousness of the police misconduct. It is not my intention or function to use this proceeding to punish the police.[33]

Relationship between the impugned conduct and the charges

[71] I have previously concluded there is a causal connection between the police misconduct in this case and the evidence the Crown wishes to rely upon in relation to the charges that post-date 1 June 2010. The Crown appears to have accepted those factual findings. Thus, the case before me differs in a material respect from the case before the Court of Appeal. The Court of Appeal reached its decision believing there was no causal connection between the police misconduct and the evidence the Crown wished to produce at trial in relation to the charges which post-date 1 June 2010.

[72] Notwithstanding this important change, my role is to independently assess whether the grounds for a stay have been established. The exercise I must undertake does not involve me simply inserting my factual findings into the Court of Appeal's judgment. My task is to determine if it would be an abuse of process for the trial to go ahead, on the facts as I have found them to be.

Reasons why a stay is necessary

[73] I have concluded that I must take the extreme step of staying the proceedings in this case for the following four reasons.

[74] First, the gravity of the police misconduct. This has been stated many times and in many ways. It involved misuse of the criminal justice system by those responsible for law enforcement.[34]

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33 *Fox v Attorney-General* [2002] 3 NZLR 62 at [37]; *R v Antonievic* above n 1 at [55]; *R v Loosely* [2001] 1 WLR 2060 at [17].

34 *Moevao v Department of Labour*, above n 21, at 482.

[75] Second, the connection between the police misconduct and the evidence gathered to support the charges that date from 1 June 2010 to the termination of Operations Explorer and Holy. But for the false warrant and prosecution scenario, the police are unlikely to have gathered much of the evidence that underpins the charges in relation to offending said to have occurred after the commencement of the scenario.

[76] Third, allowing the trial to continue invites the community to believe that the Courts implicitly condone the police misconduct in this case. Nothing could be further from the truth. Allowing the Crown to continue with this trial in circumstances where the significant misconduct of the police would be a focal point of the trial would diminish the Court's ability to maintain public confidence in the criminal justice system. There is a real risk that anything other than a significant response risks being seen as weak rhetoric.[35]

[77] Fourth, maintaining the integrity of the criminal justice system, even at the cost of staying the remaining serious charges that post-date 1 June 2010, is a proportionate and appropriate measure that is required to uphold public confidence in the administration of justice. This Court must protect the criminal justice system from being "degraded" and "misused".[36]

Conclusion

[78] Permitting the continuation of the trials in relation to the charges which post-date 1 June 2010 would undermine public confidence in the integrity of the criminal justice system.

[79] The charges which post-date 1 June 2010 are stayed.

[80] The Crown will need to decide whether it wishes to continue with the small number of charges which rely upon evidence that pre-date 1 June 2010.

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35 *Moevao v Department of Labour*, above n 21, at 482; *Fox v Attorney-General*, above n 33, at [32]-[33].

36 *R v Horseferry Road Magistrates' Court*, *Ex parte Bennett* [1994] 1 AC 42 at 76; *Fox v Attorney-General*, above n 33, at [36].

D B Collins J

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