NZLR

IN THE COURT OF APPEAL OF NEW ZEALAND

CA255/96
CA256/96

HIGH PRIORITY

THE QUEEN

V

RICHARD WILLIAM GRAYSON
PAUL FREDERICK TAYLOR

Coram: Richardson P
Gault J
Henry J
Keith J
Neazor J

Hearing: 26 August 1996

Counsel: B J Hart for Appellant Taylor
A Shaw for Appellant Grayson
J C Pike and E D France for Crown

Judgment: 28 November 1996

JUDGMENT OF THE COURT

The appellants seek leave to appeal a pre-trial ruling made in the District Court that a search warrant in respect of a property at Belk Road, Tauranga was validly issued, and the evidence obtained as a result of the execution of the warrant is admissible. An associated ruling concerning the entry into and inspection of the property by the police at a date before application for the warrant was made is also in

issue. The appellants face charges of cultivation of cannabis and possession of cannabis for supply.

Background

The appellant Taylor is the owner of a property at Belk Road, Tauranga. It comprises some 2.14 hectares, had been developed as a kiwifruit orchard and was surrounded by a substantial shelter belt. A caravan, a small pump shed and water tanks were on the property. In mid-December 1994 the police received information from an adult informant that there had been suspicious activity observed on the property, namely the erection of shadecloth approximately 6 feet in height around parts of the property and the construction of an electric fence surrounding part of it. The property carried no livestock. Further, small cannabis plants growing between the rows of kiwifruit vines had been observed by the informant's children.

The police, believing they did not have sufficient information to obtain a search warrant under s.198 of the Summary Proceedings Act 1957, made a decision to go on to the property for the purpose of corroborating the information they then had. On 12 December 1994 two officers entered the property and observed rows of cannabis plants, about 60cm in height, which had been planted between rows of kiwifruit vines. The ground had been recently rotary hoed. Their entry required negotiating electric fences and also heavy vegetation which formed the shelter belts. Shadecloth was also sighted. Some time later, but before any application was made for a search warrant, further information was received that a neighbour had entered the property and observed cannabis plants growing between the rows of kiwifruit. Other relevant enquiries proceeded.

On 20 January 1995 application for a search warrant was made in the following form:

"IN THE MATTER of Section 198 of the Summary Proceedings Act 1957 and Section 18(1) Misuse of Drugs Act 1975
AND
IN THE MATTER of an application for a Search Warrant in respect of any building, ship, carriage, box, vehicle, receptacle, premises or place situated at Lot 4 DPS 65391, Belk Road, Tauranga; 256 Rapurapu Road, RD 2, Matamata occupied by Paul Frederick TAYLOR; property at Kahukahu Road, Matamata owned/leased or used by Paul Frederick TAYLOR

TO:

of Tauranga/Registrar

I, Craig Andrew MCQUOID, Detective of Tauranga, make oath and say as follows:

1. In mid-December 1994, the Tauranga Drug Squad received information concerning a large cannabis plot that had been planted in a kiwifruit orchard at Belk Road, Tauranga.

2. The informant passing this information, resides on the property directly behind the kiwifruit orchard in question.

3. The informant stated that at the beginning of November 1994, there was a large amount of activity going on at the property, which includes shade cloth approximately six foot being placed in between the shelterbelt breaks surrounding the property. An eight wire electric fence has also been constructed and encompasses part of the property.

   The informant stated that by placing the shade cloth in between the shelterbelts, it was impossible to see into the property from Belk Road or the right-of-way, which runs along beside the property, to his house.

   A caravan has been placed at the front of the property behind the shelterbelt bordering Belk Road and it appeared that two male Caucasians are living in this caravan.

   The information stated that a vehicle that visited the address on a number of occasions that had been seen by him, was a new SS Holden Commodore coloured red, driven by a male Caucasian.

4. Members of the Tauranga Drug Squad visited the property in question on 12 December 1994 and entered the property covertly through a rear gully. In making their way into the kiwifruit orchard, they sighted a number of rows of kiwifruit planted in a T-bar growing arrangement. In between the rows was cannabis plants that had been planted approximately one

metre apart. The rows of Cannabis ran the length of the kiwifruit vine which is 100 metres long. The plants were approximately 60 centimetres in height and had been recently planted. Three rows of planted Cannabis was sighted and more are suspected of being present.

The orchard was equipped with an irrigation system which could be seen clearly running along the side of the kiwifruit.

5. Enquiries were then made with the Western Bay of Plenty District Council to see who was the owner of the property in Belk Road, Tauriko. The property was recently purchased by a Paul Frederick TAYLOR, a farmer who resides at 256 Rapurapu Road, RD3, Matamata. The property purchased by TAYLOR consists of 2.14 hectares and it's legal description is Lot 4, DPS 65391. The date of acceptance on this property was 1 November 1994 and the date of settlement and date of possession was 15 December 1994. The property was purchased for $133,00.00.

6. Enquiries with the Matamata Police resulted in the information being supplied that Paul Frederick TAYLOR is well connected in the drug world and is a supplier of bulk cannabis.

7. Further enquiries have revealed that TAYLOR recently purchased a 1993 SS Holden Commodore coloured red on 14 November 1994. TAYLOR has one previous conviction for assault in September 1993.

8. The informant has been contacted by the Police on 18 January 1995 and confirmed that the shade cloth still surrounds the property. No person has been seen at the property or visiting the property, however lights in the caravan have been sighted at night.

9. Search Warrants are sought to search the premises of Lot 4, DPS 65391, Belk Road, Tauranga, the property situated at 256 Rapurapu Road, RD 3, Matamata, occupied by Paul Frederick TAYLOR and the property situated at Kahukahu Road, Matamata, owned/leased or used by Paul Frederick TAYLOR.

10. The purposes of the Search Warrants are to search and seize the Class C Controlled Drug Cannabis, Prohibited Plant Cannabis and it's derivatives, Correspondence relating to Cultivation, Possession, Sale of Cannabis, Materials used to dry Cannabis, Instruments for using Cannabis, Money from the proceeds of the sale of Cannabis, documentation relating to purchase of farm equipment and farm property, financial affairs including bank statements, receipts, any other accounts relating to expenditure of farm equipment, shade cloth, fencing posts, fencing wire, fencing fittings, electric fence units, fertiliser, insecticide sprays, seedling trays, planter bags.

11. The purpose of obtaining any of the exhibits listed, is to connect TAYLOR and any other person involved in the cultivation of the cannabis at the Belk Road address by financial or any material evidence.

12. The cultivation of cannabis, the possession of cannabis for supply and possession of cannabis are offences against the Misuse of Drugs Act 1975 and are punishable by imprisonment.

I THEREFORE APPLY for a Search Warrant to be issued in respect of the said building, ship, carriage, box, vehicle, receptacle, premises or place situated at Lot 4 DPS 65391, Belk Road, Tauranga; 256 Rapurapu Road, RD 3, Matamata occupied by Paul Frederick TAYLOR; property at Kahukahu Road, Matamata owned/leased or used by Paul Frederick TAYLOR.

SWORN at Tauranga

this 20th day of January 1994

before me:

District Court Judge/Justice/Registrar"

A warrant was issued by a Deputy Registrar on the same day. It is in standard form, and its actual content is not relevant for present purposes. The police then undertook a surveillance operation between 29 January and 3 February, during which time the property was entered on two further occasions when videotape recordings were made. The caravan was also entered on three occasions and further videotape recordings of its contents were made. During the surveillance operation nothing was seized and no occupants were encountered.

On 3 February the warrant was executed and 1650 cannabis plants 2-3 metres in height were seized.

At the heart of the challenge to admissibility is s.21 of the New Zealand Bill of Rights Act 1990, which reads:

"**Unreasonable search and seizure** - Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise."

Search and seizure: a principled approach

Search and seizure is a difficult and complex subject affecting both the detection and proof of offending. Common law and various statutory powers of search have raised many problems and determining whether evidence has been unfairly or improperly obtained so as to lead to its possible exclusion at trial necessarily involves consideration in marginal cases of competing aspects of the public interest. The enactment of the Bill of Rights with the special focus on unreasonable search and seizure required by s 21 has raised another level of issues in the administration of criminal justice. In the last six years this Court has been flooded with cases involving s 21, the reported decisions including: (i) *Re Dickinson* [1992] 2 NZLR 43; (ii) *R v Salmond* [1992] 3 NZLR 8; (iii) *R v Jefferies* [1994] 1 NZLR 290; (iv) *R v A* [1994] 1 429; (v) *R v H* [1994] 2 NZLR 143; (vi) *R v Ririnui* [1994] 2 NZLR 439; (vii) *R v Pratt* [1994] 3 NZLR 21; (viii) *Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR 667; (ix) *Auckland Unemployed Workers' Rights Centre v Attorney-General* [1994] 3 NZLR 720; (x) *R v McNicol* [1995] 1 NZLR 557; (xi) *R v Kahu* [1995] 2 NZLR 3; (xii) *R v Stockdale* [1995] 2 NZLR 129; (xiii) *Television NZ Ltd v Attorney-General* [1995] 2 NZLR 641; (xiv) *R v Reuben* [1995] 3 NZLR 165; (xv) *R v Wojcik* (1994) 11 CRNZ 463; (xvi) *Campbell v Police* (1994) 11 CRNZ 582; (xvii) *R v Wong-Tung* (1995) 13 CRNZ 422; (xviii) *R v Smith* (1996) 13 CRNZ 481; (xix) *R v Barlow* (1995) 14 CRNZ 9; (xx) *R v Faasipa* (1995) 2 HRNZ 50; (xxi) *Queen Street Backbenchers v Commerce Commission* (1994) 2 HRNZ 94; (xxii) *R v Dodgson* (1995) 2 HRNZ 300.

And cases under the search warrant provisions of s 198 of the Summary Proceedings Act 1957 include *R v Sanders* [1994] 3 NZLR 450; *R v Briggs* [1995] 1 NZLR 196; and *R v Coghill* [1995] 1 NZLR 675.

On some aspects of search and seizure the cases demonstrate a diversity of judicial opinion. That is not surprising given the blending of the considerations of policy, principle and pragmatism underlying the Bill of Rights provisions and the balancing of the public interests involved. In other jurisdictions, too, there is a mass of case law and scholarly writing which is reflected in standard texts such as La Fave, *Search and Seizure: a treatise on the Fourth Amendment* (2ed 1987) (4 volumes); Ringel, *Searches and Seizures, Arrests and Confessions* (2ed 1991) (3 volumes); and Fontana, *The Law of Search and Seizure in Canada* (3ed 1992).

Clearly it is not possible to enunciate a single short set of rules applying to the admission of evidence obtained through search and seizure. Specific statutory provisions may over-ride common law and s 21 protections and provide their own code for determining admissibility. Searches of the person and non-trespassory investigative techniques utilising modern technologies such as electronic surveillance and long distance photography and noise detection may give rise to a host of problems not in issue in this case. In relation to trespassory interference with property where the ultimate question for consideration is the admissibility of real or physical evidence seized or found, it is possible to set out a non-exhaustive series of relevant principles or considerations.

The unique feature of real evidence is that it exists irrespective of police conduct in discovering its existence. Unlike confessional statements, where real evidence is involved the accused is not conscripted against himself or herself. And, if wrongfully seized, the property could be returned to its true owner or possessor but who would then have possession of it and would be liable to be charged in respect of any possessory offence.

The essential search and seizure challenge to admissibility of real evidence, whether under the Bill of Rights or at common law, is that the conduct of the police acting outside their powers renders the tangible fruits of their search and seizure inadmissible at trial.

It is convenient to refer to relevant principles and considerations under ten heads:

1. In broad terms a search is an examination of a person or property and seizure is a taking of that which is discovered. Entry and search of private property by officers of the state without permission of the owner or occupier is an actionable trespass unless authorised by the common law or under specific statutory provision. While not ordinarily a crime it is customary to refer to such trespassory intrusion as unlawful and illegal.

2. The settled principle of the common law of New Zealand is that evidence obtained by illegal searches is admissible subject only to a discretion, based on the jurisdiction to prevent an abuse of process, to rule it out in particular circumstances on the ground of unfairness to the accused. This ground of challenging admissibility is not affected by the availability of a challenge under s 21.

3. Section 21 is a negative restraint on governmental action. It does not confer any power on the government. It does not empower a "reasonable search". It does not validate an otherwise unlawful search and other remedies, e.g. damages for trespass, remain.

The Bill of Rights applies only to acts done by the branches of government or by any person or body in the performance of any public function, power or duty conferred or imposed on that person or body by or pursuant to law (s 3). Wholly private conduct is left to be controlled by the general law of the land. But a search and seizure actually carried out by an informer or other private individual will be governmental in character and subject to the Bill of Rights protections if there is governmental instigation or involvement in the search.

4. A search is unreasonable if the circumstances giving rise to it make the search itself unreasonable or if a search which would otherwise be reasonable is carried out in an unreasonable manner. So too seizure. Whether a police search or seizure is unreasonable depends on both the subject matter and the particular time, place and circumstance.

5. A prime purpose of s 21 is to ensure that governmental power is not exercised unreasonably. A s 21 inquiry is an exercise in balancing legitimate state interests against any intrusions on individual interests. It requires weighing relevant values and public interests.

The guarantee under s 21 to be free from unreasonable search and seizure reflects an amalgam of values. A search of premises is an invasion of property rights and an intrusion on privacy. It may also involve a restraint on individual liberty and an affront to dignity. Any search is a significant invasion of individual freedom. How significant it is will depend on the circumstances. There may be other values and interests, including law enforcement considerations, which weigh in the particular case.

6. Contemporary society attaches a high value to privacy and to the security of personal privacy against arbitrary intrusions by those in authority. Privacy values underlying the s 21 guarantee are those held by the community at large. They are not merely the subjective expectations of privacy which a particular owner or occupier may have and may demonstrate by signs or barricades.

   Reasonable expectations of privacy are lower in public places than on private property. They are higher for the home than for the surrounding land, for farm land and for land not used for residential purposes. And the nature of the activities carried on, particularly if involving public engagement or governmental oversight, may affect reasonable expectations of privacy. An assessment of the seriousness of the particular intrusion involves considerations of fact and degree, not taking absolutist stances. In that regard, and unlike the thrust of the American Fourth Amendment jurisprudence, the object of s 21 is vindication of individual rights rather than deterrence and disciplining of police misconduct.

7. Illegality is not the touchstone of unreasonableness. In terms of s 21 what is unlawful is not necessarily unreasonable. The lawfulness or unlawfulness of a search will always be highly relevant but will not be determinative either way.

   For example, the urgency of the moment or a reasonable misapprehension as to the authority to search or excusable non-compliance with the precise statutory requirements may diminish the significance otherwise attaching to non-compliance with the search laws. But if a search warrant is readily obtainable that must tell strongly against an unauthorised search. Similarly, the reasonable exercise of the power to search without warrant, e.g. under the Misuse of Drugs Act, requires that it be resorted to only where it is reasonably necessary to do so before a warrant can be obtained. And it would ordinarily be

unreasonable to conduct a warrantless search in violation of an express statutory requirement or where those searching could not meet the test specified in a directly applicable statute.

8. A search warrant is a judicial authorisation pursuant to a specific statutory power (or a common law power in respect of stolen goods) to enter, search and seize property. In many cases when alleged criminal offending is being investigated prior authorisation is required in the form of a warrant issued by a judicial officer obtained on written application and on oath. In others the safeguard of a prior warrant is not present. General authority for the police to search premises and property is provided by warrants issued under s 198 of the Summary Proceedings Act 1957. A District Court Judge, Justice or Registrar may issue a search warrant if satisfied that there is reasonable ground for believing that there is present there:

   (a) Any thing upon or in respect of which any offence punishable by imprisonment has been or is suspected of having been committed; or

   (b) Any thing which there is reasonable ground to believe will be evidence as to the commission of any such offence; or

   (c) Any thing which there is reasonable ground to believe is intended to be used for the purpose of committing any such offence.

   Under other specific statutes conditions under which warrants may be issued or warrantless searches undertaken are expressed in quite different ways and there is no single test or criterion running through the legislation.

Section 198 reflects the law's aversion to general warrants. It may not be used to authorise fishing expeditions. The sufficiency of the description of the offence, the place to be searched and the things to be the subject of the search is a matter of fact and degree. The basic right to privacy of the home requires the police, except in special circumstances, to intimate their authority before they enter. While each case turns on its own facts an unannounced peaceable entry of occupied premises or a forced entry of occupied premises without prior refusal is likely to render the search both unlawful and unreasonable.

9. Five further related features of search and seizure under s 198 warrants may be noted:

(i) As an order of an inferior court of limited jurisdiction, a search warrant issued under s 198 is amenable to challenge on jurisdictional grounds not only in proceedings instituted for that purpose but also in collateral trial proceedings in which the obtaining of the warrant and the finding of the property in question are impugned.

(ii) In terms of subss (3) and (5), a search warrant authorises "any constable at any time or times within one month from the date thereof to enter and search ... with such assistance as may be necessary" and "to seize anything referred to in subs (1)". The section thus expressly contemplates multiple entries and searches. The circumstances may call for surveillance, planning and entries, searches and seizures, each extending over several days. The requirement is that all the authorised steps be completed within one month of the issue of the warrant.

(iii) Shortcomings in procedure and documentation may be saved by s 204 of the Summary Proceedings Act which precludes any court from holding a warrant invalid "by reason only of any defect, irregularity, omission or want of form unless the court is satisfied that there has been a miscarriage of justice". Whether s 204 protects the warrant is always a question of the relative seriousness or otherwise of an error. Inevitably questions of degree and judgment arise.

(iv) Where a search warrant was issued partly on the strength of what is subsequently determined to be tainted material, in viewing validity the court considers whether the search warrant could reasonably have been issued without material of a kind which should be excluded. In some cases the excision of material unlawfully obtained by governmental agents may leave "suspicion for believing" but not "reasonable ground for believing". In other cases the material properly before the judicial officer may meet the reasonable ground for believing test and, if so, the warrant will continue to be valid.

(v) A warrant issued by a judicial officer, unless perhaps on its face patently invalid, is treated as valid and effective in law unless and until set aside. Invalidation is then retrospective. Where the police officer seeking the warrant had no reason to believe that he or she was not entitled to obtain the warrant and reasonably undertook the search and seizure in reliance on the warrant, that will be relevant in assessing the reasonableness of the search and seizure. It may constitute an objectively reasonable misapprehension of the existence of the search power at the time the warrant was obtained and executed.

10. The Bill of Rights is not a technical document. It has to be applied in our society in a realistic way. The application and interpretation of the Bill must also be true to its purposes as set out in its title of affirming, protecting and promoting human rights and fundamental freedoms in New Zealand, and affirming New Zealand's commitment to the International Covenant on Civil and Political Rights. The crucial question is whether what was done constituted an unreasonable search or seizure in the particular circumstances. Anyone complaining of a breach must invest the complaint with an air of reality and must lay a foundation for the complaint before the trial court by explicit challenge or cross-examination or evidence.

Was s 21 breached?

We turn to a consideration of the events of 12 December 1994, which were held by Thomas DCJ to be unlawful but not unreasonable. It is common ground that in the particular circumstances the police had no implied licence to enter the orchard, and that their physical entry onto the property was without legal justification and constituted a trespass. It is also common ground that the purpose of the entry was to confirm a reasonably held suspicion that illegal activity involving the cultivation of cannabis was being undertaken on the property. The Crown concedes that the information then held leading to that suspicion was insufficient to support either the issue of a warrant under s 198 of the Summary Proceedings Act 1957 or the exercise of the powers of search contained in s 18(2) of the Misuse of Drugs Act 1975. It is accepted that the intention was to use the confirmatory evidence, if obtained, to seek a warrant. As we have earlier discussed, entry without lawful justification does not of itself inevitably lead to the further conclusion that the entry was unreasonable. Whether the search was unreasonable in terms of s 21 will be a matter of fact and degree, to be determined by a consideration of all the relevant factors. We now undertake that exercise.

Police presence on the property on this occasion was of short duration, approximately five minutes according to the evidence of the officers which was accepted by the Judge. It was confined to the orchard, and did not involve any building structure, vehicle or other physical property. Entry was at a point distant from the caravan, which was the only structure with the characteristics of a dwelling. The entry was not forcible, caused no damage and did not interfere with the enjoyment of the land by any occupier. The occupiers, by their actions, had created the suspicion of criminal activity. The police actions were carried out in the course of the investigation of possible serious criminal activity. The search, although a term which can properly be applied to the activities in question, was no more than an observation made from inside the boundaries of the property of what was growing on the land. Legitimate expectation of privacy, viewed objectively, may perhaps be infringed by such a temporary entry, even when onto an orchard which has no dwellinghouse immediately adjacent to it. This particular infringement, however, is not in the circumstances we have detailed of such seriousness as to call for condemnation as being unreasonable and therefore in breach of s 21. It was not conducted in what could be described in ordinary parlance as a warrantless search. It did not involve a detailed examination of either of a person or property such as is usually associated with a police search and is exemplified in such cases as *Pratt* and *Jefferies*. No seizure resulted. It is also relevant that evidence of the observations made by the officers would clearly be admissible at common law despite the trespass. We therefore hold that it was open to the Judge to find that the entry on 12 December 1994 was not unreasonable, and therefore not in breach of s 21 of the Bill of Rights. No other ground for excluding the evidence of the officers as to what was observed by them on that occasion was pursued, and it follows therefore that the evidence is admissible.

The consequence is that the primary basis for challenging the validity of the search warrant issued on 20 January 1995 disappears. It is clear that the evidence disclosed in the application form was sufficient to meet the requirements of s 198.

Other criticisms concerning the application for the warrant and its issue were raised by Mr Shaw in his submissions. They are lacking in substance on the question of validity, and do not require further discussion.

For completeness, we go on to consider the position had the entry on 12 December been in breach of s 21. The first step would have been to consider whether that evidence should be excluded from the content of the application for the search warrant. For present purposes we assume exclusion. Because it is common ground that the remaining evidence detailed in the application was not sufficient to meet the statutory requirements, then, subject to one reservation, the warrant would likely be held to be incorrectly issued and liable to be set aside. The reservation is that if Detective McQuoid was aware of the excision, the information obtained from the neighbour after 12 December may have been presented, possibly curing the deficiency. What then needs determination is whether the search and seizure carried out when the warrant was executed thereby became unreasonable and therefore in breach of the Bill of Rights. The relevant factors to be weighed are:

(1) the warrant relied upon was wrongly issued because it had been obtained by the use of evidence emanating from a breach of the Bill of Rights;

(2) the police knew that the evidence had been obtained as the result of trespass;

(3) the evidence and the way in which it was obtained was disclosed in the application;

(4) the application contained no other vitiating element;

(5) additional undisclosed information was available to support the application, namely the sighting by a neighbour of cannabis plants growing on the property;

(6) the police could reasonably assume that the warrant was valid for their purposes - it was not a nullity;

(7) for the reasons earlier identified the 12 December trespass and search was not a gross or serious invasion of privacy even assuming it infringed s.21;

(8) the search and seizure was carried out in a reasonable manner;

(9) significant real evidence was found.

Having carefully weighed those factors, we conclude that the search and seizure of 3 February were reasonable, even had there been grounds for setting aside the warrant following a detailed examination such as was conducted in the District Court.

Remedies for breach

There being no breach of s 21, the issue of remedy does not arise for determination. We propose however to make some brief comments in that respect.

The development and choice of remedy in the case of breach of the Bill of Rights is often seen as affected by the purposes and nature of the provision in issue.

A rights centred approach, supported by the title, by s 2 and by the formulation of the substantive provisions, might emphasise remedies (such as monetary damages or compensation as well as the exclusion of evidence) favouring the person aggrieved.

Another aspect is that the obligations in the Bill are placed on state authorities (including the Courts) which might emphasise compliance by those authorities with the Bill.

A broader perspective also looks to the general underlying public interest. That involves in particular the tension between the affirmation of the rights of the individual, to be enjoyed by all members of the community, and the recognition to be found in particular provisions, notably in s 5 of the fact that there are limitations on the rights, in particular "reasonable limits prescribed by law [which] can be demonstrably justified in a free and democratic society".

A further important feature of many provisions of the Bill of Rights is their procedural character. In particular if the state is to take action which will deprive members of the community of their liberty for breach of the criminal law, then correct procedures, reflecting centuries of development and principle, are to be followed. It has been wisely said that the history of individual liberty is largely the history of the development of procedural safeguards.

The remedies might, in the first place, relate to the trial itself. For example evidence might be rejected, with the possible consequence of the prosecution failing, the penalty imposed might be reduced or there might be an appropriate order for costs. There is the possibility of police disciplinary proceedings, criminal prosecution, and civil proceedings. Proceedings brought by an aggrieved person might lead to damages or compensation, a declaration, or future-looking relief.

The experience in other jurisdictions, notably Canada and the United States of America, suggests the need for a careful balancing of the identification and scope of the guaranteed rights and appropriate remedies where rights have been breached. The pursuit of a broad approach to right identification with remedies inflexibly allowed could lead to imbalance in individual and community rights. Protection and vindication of individual rights are themselves community values but, as the Act makes clear, limitations are justified (indeed necessary) in a free and democratic society. There are helpful discussions of these issues by the Law Commission in its report *Police Questioning* (NZLC R 31 1994) 23, 33-34, 53, 98-105, and in the articles by Mahoney, (*Vindicating Rights; Excluding Evidence Obtained in Violate of the Bill of Rights* (in Rishworth and Huscroft eds), *Rights and Freedoms* (1995) 447)) and Walker, (*Wilkes and Liberty: A Critique of the Prima Facie Exclusion Rule* (1996) 17 NZULR 69).

A robust and rights centred approach to individual rights is not necessarily inconsistent with flexibility of remedies where rights are breached. A remedy is no less an effective remedy because it is one appropriate to the circumstances of the breach rather than a remedy inflexibly applied in respect of all breaches.

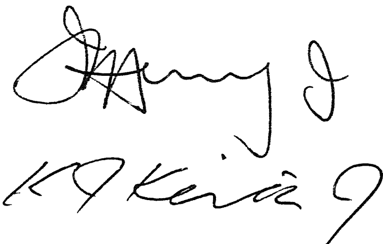
The formulation of appropriate remedies should be approached broadly. To settle upon a single remedy to be applied in all cases rather than keeping open the full range of possible remedies risks inflexibility and the rejection of possibly more appropriate remedies in particular cases. Similarly the response to any particular breach arguably should be at the appropriate level. It should be no less an effective

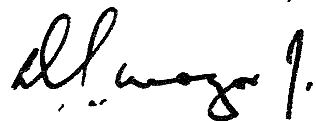
remedy because it is fashioned to bear some relationship to the nature and seriousness of the breach. Whether there should be the same response to breaches of rights in the course of activities resulting in the discovery of real evidence as to breaches of rights in the course of obtaining, for example, confessional evidence also requires careful consideration.

Having regard to the above matters, on an appropriate occasion the Court would be prepared to re-examine the prima facie exclusion rule.

Conclusion

For the reasons detailed above we agree with the District Court Judge that the evidence in question is admissible. The application for leave to appeal is granted, but the appeal is dismissed.





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