NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA250/2010
[2013] NZCA 321

BETWEEN	LARRY GORDON CANT Appellant
AND	THE QUEEN Respondent

Hearing:	11 July 2013
Court:	Stevens, Heath and Cooper JJ
Counsel:	Appellant in person, assisted by M V Lyttelton as McKenzie Friend M F Laracy for Respondent
Judgment:	23 July 2013 at 3.30 pm

JUDGMENT OF THE COURT

A All applications for further disclosure are dismissed.

B The application to remove Crown counsel as counsel for the respondent is dismissed.

REASONS OF THE COURT

(Given by Stevens J)

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Introduction

[1] The appellant, Mr Cant, was convicted following trial before Judge Gittos and a jury, of assault with intent to commit sexual violation. His sentencing was delayed. Although he had not by then been sentenced on 29 April 2010 the appellant filed a notice of appeal in this Court against conviction and any sentence that might be imposed. He was later sentenced to preventive detention.[1]

[2] The substantive appeal was due to be heard on 20 July 2011. On that occasion Mr Lawry for the appellant sought an adjournment. The topic of further disclosure by the respondent was also raised at that hearing. The parties were able to reach an agreement on the disclosure of further information.[2]

[3] A previous application for further disclosure was heard in this Court in October 2012. It involved three categories of documents. They concerned a request for disclosure in respect of border and investigation reports held by Immigration New Zealand which was granted, and applications for disclosure in relation to ESR and the police which were refused. [3]

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1 *R v Cant* HC Auckland CRI-2006-004-26731, 20 May 2010.
2 The agreement between the parties is recorded in a Minute issued by the Court on 20 July 2011.
3 *Cant v R* [2012] NZCA 494 at [31], [45] and [46] [the first disclosure decision].

[4] As articulated by this Court at the first disclosure hearing, the substantive appeal concerns five key issues: legal representation at trial; evidence of the complainant's previous sexual experience; an allegation the Crown prosecutor at trial breached s 33 of the Evidence Act 2006; the circumstances of a *Papadopoulos* direction by the trial Judge; and a challenge to the DNA evidence.[4]

[5] Since that judgment the appellant has filed yet further disclosure applications. This has led to delays in the hearing of the substantive appeal, which is now set down to be heard on 1 August 2013. On 21 June, Randerson J directed that the following pre-hearing matters be dealt with on 11 July 2013:

(a) the applications for further disclosure; and

(b) an application to remove Crown counsel, Ms Laracy.

[6] This judgment deals with these two issues.

Background facts

[7] In the first disclosure decision, this Court summarised the background facts as follows:

> [4] The Crown at trial alleged that the complainant left a central city Auckland bar early in the morning of 13 December 2006. The appellant, who was seated nearby, followed the complainant as she walked home. As she was walking along Mayoral Drive she was attacked by the appellant who pushed her into a garden, placed a hand around her throat and one on her knee. He kissed her and tried to undo the top button of her jeans. He then fondled her breasts on the outside of her clothing and tried to put his hands down her jeans. The complainant's evidence was that the appellant said he wanted to have sex with her.
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> [5] Two passersby heard the complainant yelling. They went to intervene and the appellant then ran away. An immediate complaint to the police was made. Some 16 days later the complainant coincidentally saw the appellant. She told the police and the appellant was arrested. The appellant told the police that they had arrested the wrong person.
>
> [6] There were difficulties with the appellant's representation before and at trial and eventually the appellant represented himself during the trial. An amicus curiae was appointed to assist him.

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4 The first disclosure decision at [2].

> [7] In his opening statement to the jury the appellant said that he had been with the complainant at Mayoral Drive (contrary to his police statement). However, he said the complainant who was a Brazilian national had targeted him to lay a false complaint because she wanted to stay in New Zealand. In cross-examination of the complainant it was suggested that she had assaulted the appellant and had demanded drugs and money.
>
> [8] The appellant did not give evidence at trial.

[8] The above summary sufficiently captures the background for the purposes of determining the present applications.

Representation

[9] The appellant has been represented in the conduct of this appeal by (sequentially) Mr Lawry, Mr Newell and Mr Paino. In May 2013 Mr Paino sought leave to withdraw on the basis that he was not prepared to argue one of the grounds identified by the appellant, namely, that there had been a criminal conspiracy between those involved in his trial, including the police, various civilian witnesses, the prosecutor, his former trial counsel, the amicus curiae and the Judge (the trial conspiracy). The appellant indicated that he did not seek alternative counsel but instead wished for Mr Lyttelton (a non-lawyer) to file submissions on his behalf.

[10] In a Minute issued on 14 May 2013 Randerson J granted Mr Paino leave to withdraw and indicated that the question of whether Mr Lyttelton should be permitted to speak for the appellant at the hearing of the appeal on 1 August 2013 was to be determined by the panel hearing the appeal.

[11] So far as the hearing of the present applications is concerned, the appellant sought to represent himself, accompanied by Mr Lyttelton as a McKenzie Friend.[5] To assist the Court at the hearing and given the urgency in determining these issues, we reluctantly granted leave for Mr Lyttelton to speak on behalf of the appellant.

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[5] The Report of the Judicial Working Group on Litigants in Person (commissioned by the Judiciary of England and Wales) dated July 2013 refers to the term "McKenzie Friend" at [6.24] as follows: "[it] strictly applies only to those who sit quietly by and assist a litigant in person in court; but increasingly it has been used to cover all lay assistants no matter how extensive their role, including those who have been given the right to speak for a litigant in a particular case. It has led to a misunderstanding by some that lay assistants have a right to be an advocate." Compare with *R v Prince* CA12/81, 17 June 1981 at 3.

This was for the purposes of this hearing only and was expressly stated to be an indulgence allowed in the special circumstances of this hearing.

[12] Mr Lyttelton has filed three memoranda on the issues of further disclosure and representation. These are dated 31 May, 11 and 17 June 2013. The latter two documents are essentially duplicates and we were asked to put aside the memorandum of 11 June and to consider the two sets of submissions dated 31 May and 17 June. At the hearing Mr Lyttelton also referred us to the first eight pages of his submissions dated 1 July 2013 filed for the purposes of the substantive appeal. This material was addressed by Mr Lyttelton orally at the hearing. For the respondent, Ms Laracy has filed separate memoranda on each issue.

Application for further disclosure

[13] There are four key categories of documents (and information[6]) sought by the appellant. Three of these categories are referred to in a letter of Mr Paino to counsel for the respondent dated 18 September 2012. The requests were repeated in the memorandum of the appellant's outstanding disclosure and discovery requests dated 31 May 2013. A fourth category of documents and information was raised as a new disclosure request in the appellant's memorandum dated 31 May 2013.[7] We will describe the categories below.

[14] The appellant claims that further disclosure will support his allegation of the existence of an extensive conspiracy involving criminal behaviour by those involved in his trial including perjury and corruption. More particularly the appellant says that all those identified as participants in the trial conspiracy were engaged in a criminal conspiracy to bring a false prosecution, or at least to deliberately misrepresent the truth in respect of certain aspects of the evidence adduced at trial. These allegations are in part summarised in the appellant's submissions filed earlier[8] in support of the appeal against conviction as follows:

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6 We include the word "information" advisedly as a number of the appellant's requests do not relate to documents. Rather they are various categories of information sought by means of questions or what in the civil jurisdiction are called interrogatories.

7 At paras 58 and 59.

8 See appellant's revised submissions based upon disclosure of the in-chambers transcripts and subsequent disclosure received, dated 6 June 2013 at 3. The allegations are expanded upon in the appellant's revised submissions dated 1 July 2013 where the acts related to the conspiracy

> Many criminal acts have been committed by way of a chain conspiracy, with a common purpose being to secure the appellants conviction and sentence to a life sentence of preventative detention, as follows;
>
> **A conspiracy was formed to aid, abet, counsel and incite [the complainant] to make a false complaint against the appellant –** of attempted sexual violation – such that if convicted, the appellant would receive a life sentence of preventative detention.
>
> - This conspiracy was initiated on the morning of the 13th of December 2006.
>
> - The conspiracy was initiated by [the complainant], along with her boyfriend (and employer) [Mr Williams].
>
> - Jason Williams then involved his senior police contacts and handlers, including Detective Sergeant (DS) Joe Aumua and Acting Detective Sergeant (ADS) Simon Welsh.
>
> …
>
> **Senior police procured [the complainant] to commit an offence**, being to bring a false complaint, to make false statement and to commit perjury.

[15] The appellant has also made serious allegations against the Crown counsel previously handling his appeal. Such allegations include "seriously misleading the Court of Appeal" in the manner described in his submissions in support of the substantive appeal. These issues are not relevant to the disclosure requests before us.

[16] The present applications for further disclosure fall into four categories: those relating to a potential witness Lance Gibb; those relating to Detective Sergeant Joe Aumua; those relating to the complainant's travel to South America; and those relating to the private investigator, Mr Michael Campbell, as well as amicus at the trial, Mr Lester Cordwell. In order to understand the applications for disclosure of documents and information in these four categories we will briefly describe the background which is said to be relevant to each.

Category 1 – Lance Gibb

[17] The appellant wanted Mr Gibb to be called as a defence witness at trial. The appellant claimed that two days before the incident the subject of the charge,

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are extensively canvassed in an 85 page document dealing inter alia with judicial misconduct, prosecutorial misconduct, police misconduct, amicus curiae misconduct, defence counsel misconduct and complainant perjury.

Mr Gibb had introduced the appellant to the complainant when the appellant and his girlfriend had been in the company of Mr Gibb (who the appellant claims is a pimp).[9]

[18] When the time came for defence evidence at the trial the appellant had been unable to locate Mr Gibb. Judge Gittos directed that Mr Gibb, who was apparently at the time subject to a warrant for his arrest, should be subpoenaed and that the "officer in charge and the Crown put some police resources in place to have those subpoenas served so that anyone that is needed here is duly notified". Detective Greaves followed up on this request from the Judge.

[19] Detective Greaves subsequently provided the Judge with a job sheet that described his unsuccessful attempts to locate Mr Gibb. The Judge informed the jury that the police had visited all known addresses without finding Mr Gibb; that he remained at large and subject to a warrant; and that although the police were actively seeking him it was likely that he would not be found in time to be of assistance in the trial.[10] It is the appellant's position that Detective Greaves misled the trial Judge in order that the appellant be deprived of the opportunity of calling Mr Gibb as a defence witness at his trial.

[20] At the hearing before us, Mr Lyttelton advised that attempts to locate Mr Gibb in recent times had been successful. He also said that the appellant and his advisers now knew where Mr Gibb is residing. We return to this aspect later.

[21] In respect of the witness Mr Gibb, the appellant now seeks the following information:[11]

(a) An answer to the following question: has the trial Judge, Judge Gittos been misled by police or is there some explanation available to explain the directions given by Judge Gittos in relation to Mr Gibb?

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9 The only evidence of this version of events is contained in an affidavit of the appellant in support of his appeal dated 4 July 2011.

10 The Judge also issued a ruling recording these developments: *R v Cant* DC Auckland CRI-2006-004-26731, 16 February 2009 (Ruling No 18).

11 The request for the information sought in (a) and (b) was made in a letter sent by Mr Paino referred to above at [13]. The information in (c) and (d) emerged as one of the requests for further disclosure in the appellant's submissions on disclosure dated 31 May 2013.

(b) Could [the Crown] please explain and provide some evidence as to Mr Gibb's whereabouts in February 2009, including why police made the representations they did in relation to their inability to trace Mr Gibb?

(c) Answers to a number of specific questions in relation to the actions of the private investigator engaged to assist the appellant in preparation for trial (Mr Campbell) and the amicus (Mr Cordwell). These questions relate to Mr Campbell's investigation into the whereabouts of Mr Gibb, and Mr Cordwell's supposed decision not to release to the appellant the results of that investigation.

(d) A complete copy of the purported arrest warrant – and associated documentation – issued on 22 January 2009, for the arrest of Mr Gibb supposedly for breach of Court release conditions.

Category 2 – Detective Sergeant Aumua

[22] The officer who dealt with the complainant immediately after the incident was Acting Detective Simon Welsh. On 13 December 2006 Detective Welsh prepared a job sheet in relation to his decision not to take a statement from a Mr Li Ye Fang. At the bottom of the job sheet there is a statement that it was checked by Detective Sergeant Joe Aumua.

[23] The appellant claims that there is a "history of animosity" between himself and Detective Sergeant Aumua dating back to 1993. He alleges that this animosity motivated Detective Sergeant Aumua to participate in the criminal conspiracy between those involved in his trial.[12]

[24] The appellant now seeks the following documents and information:

(a) An explanation of why Detective Sergeant Aumua signed off on a job sheet of Acting Detective Simon Welsh, when the appellant's

[12] Described at [14] above.

understanding was that Detective Sergeant Aumua was a serving officer based at Avondale Police station.

(b) Copies of Detective Sergeant Aumua's diary entries for 12-13 December 2006.

(c) An explanation of whether Detective Sergeant Aumua has had any involvement with the complainant, Mr Gibb or Mr Williams.

(d) Further information relating to any role that Detective Sergeant Aumua may have had in the investigation.

Category 3 – the complainant's travel to South America

[25] The complainant gave evidence that she was living in Brazil before the trial, but had returned to New Zealand to participate in the trial. Her flights were paid for by the Ministry of Justice, although this was not disclosed to the jury.

[26] The appellant considers that he has material which suggests that the complainant was not resident in Brazil prior to the trial, but was instead living in Chile or Argentina, or some other location. Further, he suggests that she did not return to Brazil after the trial but has continued living in New Zealand. It is in this context that the appellant seeks the following documents and information:

(a) copies of all tickets, invoices and correspondence in relation to the complainant's tickets, including all correspondence between the Crown and the complainant in regard to the funding and arrangement of her travel;

(b) copies of the complainant's passport to confirm whether she entered Brazil between 21 December 2008 and 25 February 2009; and

(c) confirmation of whether the airfares paid for by the Ministry of Justice represented a form of benefit in return for giving evidence against the appellant.

Category 4 – documents and information from private investigator and amicus at trial

[27] In this category the appellant seeks answers to a series of six questions concerning the actions of the private investigator engaged to assist the appellant in preparation for trial (Mr Campbell) and the amicus curiae (Mr Cordwell).

[28] These questions were set out in Mr Lyttelton's memorandum of 31 May 2013 as follows:

> [52] Why was Mr Cant not provided with Mr Campbell's investigation files by Mr Cordwell, before the trial began or else during the course of the trial?
>
> [53] Why did Mr Cordwell, the Court appointed amicus – have the working files of Mr Campbell in his sole possession throughout the trial – all without the knowledge and authority of Mr Cant?
>
> [54] Why did Mr Cordwell mislead the Court by not informing the Court and Mr Cant of the status of Mr Campbell's efforts to trace and summon Mr Gibb – and other witnesses?
>
> [55] Why did Mr Cordwell mislead police by not providing Detective Greaves with access to Mr Campbell and his files, including all his information and intelligence on the whereabouts of Mr Gibb?
>
> [56] Why did Mr Cordwell mislead and allow both Judge Gittos and Mr Cant to believe that no summons had been issued for Mr Lance Gibb when in fact a summons had been issued on the 15th January 2009?
>
> [57] If there is an arrest warrant in existence dated the 22nd of January 2009 – then is this in fact the arrest warrant that Mr Campbell and Mr Dixon were applying for? – that Mr Campbell was to have his affidavit ready for – on the Thursday the 22nd of January 2009? ....
>
> (Emphasis omitted.)

Applicable legal principles

[29] Ms Laracy referred us to the Criminal Disclosure Act 2008 (the Act) which applies to all criminal proceedings commenced on or after 29 June 2009 (the commencement date). As the criminal proceedings against the appellant began in 2006 this raises an issue of whether the provisions of the Act apply to appeals filed after the commencement date in respect of a proceeding that had been commenced prior to that date.

[30] This issue needs to be addressed in the statutory context which is as follows. Section 13 of the Act provides for full disclosure of defined information by the prosecutor. Thus in respect of a criminal proceeding the prosecutor must disclose to a defendant information defined as standard information as soon as is reasonably practicable.[13] The prosecutor's duty is ongoing.[14] The word "information" is defined as follows:[15]

> (2) In this Act, a reference to **information** means any recorded information—
>
> (a) in whatever form it is contained, for example, in a report, statement, list, or interview; and
>
> (b) in whatever medium it is recorded, for example, in hard copy, electronic form, or as a sound or visual recording.

[31] The scheme of the Act also provides that the prosecutor is under a statutory duty to disclose information referred to as "additional disclosure". The respondent accepts that such an obligation, or a common law obligation like it, applies post-conviction. Section 14 relevantly provides:

> **14 Request for additional disclosure**
>
> (1) At any time after the duty to make full disclosure has arisen under section 13, the defendant may request that the prosecutor disclose any particular information, identified by the defendant with as much particularity as possible.
>
> (2) The prosecutor must disclose information requested by the defendant under subsection (1) unless—
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> (a) the information is not relevant; or
>
> (b) the information may be withheld under section 15, 16, 17, or 18; or
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> (c) the request appears to be frivolous or vexatious.

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13 "Standard information" is a term defined in s 13(3) to include matters such as copies of the statements and briefs of evidence made by prosecution witnesses and lists of exhibits.

14 The entitlement of the defendant to standard information continues while the criminal proceedings are in progress, including any appeal against conviction: s 13(6). This is consistent with the approach in *R v Makin* [2004] EWCA Crim 1607 at [36].

15 Criminal Disclosure Act 2008, s 6(2).

[32] Importantly, under s 14(2)(a), the prosecutor is not obliged to give such additional disclosure unless the information is relevant. The word "relevant" is defined in s 8 of the Act as follows:

> **relevant**, in relation to information or an exhibit, means information or an exhibit, as the case may be, that tends to support or rebut, or has a material bearing on, the case against the defendant.

Given that these words may need to be applied in the context of an appeal, some adaptation of the statutory wording will be required.[16]

[33] Whether these disclosure obligations in ss 13 and 14 apply to a particular criminal proceeding turns on an interpretation of s 4 of the Act and the definition of criminal proceedings. By s 4 the Act is said to apply to all criminal proceedings that are commenced after the commencement date. The term "criminal proceedings" is defined to include "any appeal against conviction or sentence".[17]

[34] We consider that, as a matter of statutory interpretation, the preferable view is that this case does not fall with the definition of "criminal proceeding". As we have noted the appellant was arrested and his trial in the District Court completed before the commencement date of the Act. It is true that his appeal was filed after the commencement date but our reading of the definition of criminal proceedings, together with s 4 of the Act is that the Act only applies to criminal proceedings commenced on or after the commencement date. While the term "criminal proceedings" includes any appeal against conviction or sentence, we consider that applies only in respect of appeals that relate to criminal proceedings commenced after 29 June 2009.

[35] This approach is reinforced by the transitional provision in s 41(1) under which criminal proceedings commenced before the date on which the Act comes into force continue as if the Act had not been enacted. Section 41(2) of the Act goes on, despite s 41(1), to make provision for the prosecutor and defendant to agree that, by

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16 Where the Court is dealing with an appeal against conviction, it follows that the words "the case against the defendant" need to be assessed in the light of the context and the justiciable issues at the appellate stage.

17 Criminal Disclosure Act, s 6.

way of notice in writing lodged with the Court, criminal proceedings commenced before the commencement date should be subject to the requirements of the Act.

[36] Consequently, we consider that the Act does not apply to the present application. However, we record that Ms Laracy accepted that disclosure obligations of a similar nature and scope to those set out in the Act should be taken as applying for the purposes of this appeal.

[37] This is as a result of the operation of s 389(a) of the Crimes Act. Section 389(a) provides:

> **389 Supplemental powers of appellate courts**
>
> For the purposes of any appeal or application for leave to appeal against conviction or sentence the Court of Appeal or the Supreme Court may, if it thinks it necessary or expedient in the interests of justice,—
>
> (a) order the production of any document, exhibit, or other thing connected with the proceedings the production of which appears to the court to be necessary for the determination of the case.

[38] In the first disclosure judgment this Court referred to the wide powers under s 389(a).[18] However, in that appeal the Court heard no argument as to the scope of the jurisdiction. With respect to such scope, this Court in *R v D* described the threshold test as follows:[19]

> This discretion is not lightly to be exercised. It will normally require the establishment by an appellant of the likelihood of the existence of information which is cogent to the inquiry whether a miscarriage of justice has occurred. ... The jurisdiction is not part of an investigatory procedure, and clearly would not be assumed for that purpose other than in exceptional circumstances.

[39] In this case the Crown accepts a duty post-verdict to disclose any information in the possession of the prosecutor (including the police, the Crown Solicitor or Crown Law) which creates a real risk that justice has miscarried and/or a real risk that the verdict is unsafe. This is consistent with the position that pertains in

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[18] The first disclosure decision, above n 3, at [12].

[19] *R v D* CA371/95, 17 April 1996 at 4; see also *R v Nepia* CA32/00, 3 October 2000 and *R v Taylor* CA130/02, 17 December 2003. For a recent example of the application of s 389(a), see *Polyblank v R* [2013] NZCA 208.

England and Wales. In that jurisdiction the *Attorney-General's Guidelines on Disclosure* provide for post-conviction disclosure in the following terms:[20]

> **Post-Conviction**
>
> 59. The interests of justice will also mean that where material comes to light after the conclusion of the proceedings, which might cast doubt upon the safety of the conviction, there is a duty to consider disclosure.

[40] Ms Laracy also referred us to the judgment of the Divisional Court in *Nunn v The Chief Constable of the Suffolk Constabulary.*[21] However, that case is of limited assistance to us as the Criminal Procedure and Investigation Act 1996 (UK) provides that the duty of continuing disclosure ceases on conviction.[22]

The test for disclosure

[41] Ms Laracy submits that, although there is little in the way of judicial guidance on the point in the context of appeals, an obligation of disclosure post-conviction would arise where the following four conditions are met:

(a) The request relates to documents.[23]

(b) The documents are in the possession or control of the prosecutor.[24] Government agencies that are not involved in the prosecution should be excluded.

(c) The disclosure sought must be relevant to an articulated ground of appeal.

(d) The Court must be satisfied that, if it is to be produced, the document must put in issue, or bear upon, the safety of the conviction.

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20 Available at <www.cps.gov.uk>.

21 *Nunn v The Chief Constable of the Suffolk Constabulary* [2012] EWHC 1186 Admin.

22 Criminal Procedure and Investigation Act 1996 (UK), s 7A.

23 Ms Laracy referred us to the definition of "information" in s 6(2) of the Criminal Disclosure Act set out above at [30].

24 This term should include any person or office having responsibility for the prosecution of criminal proceedings in New Zealand. For cases to which the Criminal Disclosure Act applies "prosecutor" is defined in s 6(1).

[42] On the topic of post-conviction disclosure, we have already referred to the earlier decision of this Court in *R v D*.[25] There was a reference in that case to the requirement that the information be "cogent to the inquiry whether a miscarriage of justice has occurred".[26] We read that reference as concerning the need for relevance and linkage to a miscarriage. As we see it the requirements of the Act now focus on the concept of relevance rather than cogency.

[43] In the light of these authorities we consider that, where a request is directed to the prosecutor after conviction, the guiding principles informing the interests of justice may be reduced to three:

(a) The request must relate to documents of the type defined in the Act or items such as exhibits or material related to exhibits. Questions or interrogatories are not appropriate as the subject of an application for disclosure.

(b) The documents or exhibits must be in the possession or control of the prosecutor. Material in the power or possession of other Government agencies would not be covered. That would need to be accessed through other means, for example the Official Information Act 1982 or the non-party disclosure regime in the Act.

(c) In an appeal context, the disclosure must be relevant in the sense that the information must relate to, or have a material bearing on, an articulated ground of appeal.

[44] The above principles are not to be seen as exhaustive. Rather they should be viewed as providing guidance to the requester (for disclosure) and the prosecutor to resolve requests, hopefully without the need for judicial intervention. Such principles are broadly consistent with the provisions of the Act. In a case where the Act clearly applies, the application will normally fall to be determined by applying the statutory provisions.

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25 *R v D*, above n 19.
26 At 4.

The four requests for disclosure

Category 1 – Lance Gibb

[45] We should say at the outset that we are not satisfied that the appellant has come anywhere near demonstrating the existence of a criminal conspiracy involving extensive criminal behaviour including perjury and corruption of the type described at [14] above.

[46] That said, the critical point is that this request for disclosure relates to possible fresh evidence from the witness Mr Gibb. Although there were difficulties locating Mr Gibb at the time of the appellant's trial, that is no longer the case. The appellant and his advisers now know where Mr Gibb is residing. If fresh evidence is said to be available from Mr Gibb then it is incumbent upon the appellant's advisers to interview Mr Gibb, obtain an affidavit setting out the evidence concerned and then file an application in this Court seeking its admission for the purposes of the appeal.

[47] Given the availability of Mr Gibb to the appellant, the particular disclosure referred to at [21] above simply falls by the wayside. The appellant's advisers can simply ask Mr Gibb the questions listed in [21](a) to (b) above. We should add that, even if Mr Gibb had not been available, the disclosure sought would have been declined in any event. The reasons for so deciding are as follows. The requests in [21](a) to (b) do not fall within the principles of disclosure. They are in the nature of questions or interrogatories and is not appropriate for the Court to direct the prosecutor to respond to it.

[48] Questions or interrogatories are not properly directed to the prosecutor in the post-conviction phase. With regard to the information outlined in [21](c) we note that the appellant also seeks information about the actions of a Mr Campbell and the amicus curiae, Mr Cordwell, and their actions involving Mr Gibb. There is no suggestion that these gentlemen are not available should the appellant require such information from them. If he wishes to pursue this information his advisers should approach them direct. Having spoken to these persons, it would be for the appellant's advisers to determine whether or not either or both of them can provide information which would qualify as fresh evidence for the purposes of the appeal.

[49] So far as the disclosure sought in [21](d) is concerned, the appellant has not demonstrated any basis upon which the arrest warrant and associated documentation could be said to meet the test for disclosure.

Category 2 – Detective Sergeant Aumua

[50] The information sought is described at [24](a) to (d) above. Three of the categories namely (a), (c) and (d) are not apt for disclosure. They are simply questions or interrogatories, rather than documentation or exhibits. The second category involves copies of Detective Sergeant Aumua's diary entries. The application for such documentation is declined. We are satisfied that such information is not relevant to any matter that has a material bearing on the appeal.

Category 3 – the complainant's travel to South America

[51] This matter was extensively canvassed at the first disclosure hearing. At that time the appellant sought copies of pages of the complainant's passport relating to the period around the time of the appellant's trial. This request was designed to establish where the complainant resided prior to the trial and whether she was out of New Zealand when the trial began.

[52] In the first disclosure judgment the Court ruled that there was no need for the Crown to disclose this material to the appellant. This was on the basis of a Crown concession recorded at [46](b) of the judgment:

> … the Crown accepted before us that, as the appellant claimed, at the time of the trial the complainant was not a resident of Brazil and was living in New Zealand on a work permit. Secondly, the Crown accepted that at the time of the trial the complainant was on holiday overseas (a trip that she had paid for). The trial had been adjourned or delayed on a number of occasions and the ultimate date clashed with a prearranged holiday paid for by the complainant. The Ministry of Justice, therefore, paid the complainant's return airfare from her holiday destination to New Zealand so that she could give evidence at trial. The purpose of obtaining portions of the complainant's passport had been for the appellant to establish what the Crown have now accepted; that at the time of the trial the complainant was living in New Zealand and at the time of the trial she was overseas on holiday and returned to New Zealand for the trial. Given those concessions, copies of pages of the complainant's passport is not required.

[53] It is inappropriate that this Court should be burdened by repeated requests for disclosure of this nature prior to the substantive hearing of the appeal. The matter was determined earlier and nothing has been put before us to warrant the Court revisiting this issue.

[54] The application for disclosure of the documents and information referred to at [26](a) to (c) is declined.

Category 4 – private investigator and amicus curiae at trial

[55] This category involves documents and information of the type set out at [28] above. We have already referred[27] to the appellant's request for information from the private investigator, Mr Campbell and from the amicus curiae, Mr Cordwell. This category of request simply repeats the request for information from these persons.

[56] If such information is still sought then we see no reason why these persons should not be approached directly and interviewed to ascertain whether or not they are able to provide relevant information. If they have relevant information it should be reduced to affidavit form and be the subject of an application for fresh evidence to be adduced in connection with the substantive appeal.

Disclosure if the Act applied

[57] Ms Laracy confirmed before us her written submission that any information which would fall within s 13 of the Act if it applied has been disclosed in this case. We accept this assurance. It follows that there is no question of this Court ordering disclosure of the type of information to which s 13 applies.

[58] The same applies in relation to additional disclosure of specific information that would be covered by s 14 of the Act. Ms Laracy confirmed in her written submissions that there is no information in this category known to Crown counsel, to the prosecutor or to the police that ought to be disclosed. We accept this assurance

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[27] At [48] above.

too. The appellant has put no objective material before us to justify further inquiry into this type of disclosure.

Application to remove Crown counsel

[59] The appellant has filed an application to have Crown counsel, Ms Laracy, removed as counsel in the appeal. This application followed the refusal by Crown counsel to concede the appeal or provide yet further disclosure without order of the Court.

[60] The appellant alleges that Crown counsel is a party to a criminal conspiracy to bring a false prosecution or at least to deliberately misrepresent the truth in respect of certain aspects of the evidence adduced at trial. The allegations that the appellant makes against Crown counsel include that, in refusing further disclosure, Crown counsel is "acting deliberately to conceal exculpatory evidence [from the appellant]".

[61] The principles in this area are clear. The Court may debar counsel from acting in a proceeding where it is necessary in order for justice to be done or seen to be done.[28] The threshold for removal of counsel is high requiring something extraordinary to warrant that course.[29] In *Clear Communications Ltd v Telecom Corporation of New Zealand* Fisher J opined that the jurisdiction to remove counsel will only be exercised in cases of "truly egregious misconduct likely to infect future proceedings".[30] The principles summarised by Fisher J were endorsed by this Court in *Fava v Aral Property Holdings Ltd*.[31] There is no need for us to set out in detail the relevant principles which are not in dispute.

[62] We are satisfied that there is no factual justification for the appellant's claims of a criminal conspiracy to bring a false prosecution. Neither is there any evidence to suggest that Ms Laracy has deliberately misrepresented the truth in respect of the aspects of the evidence adduced at trial. The evidence adduced at trial is available

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28 *Black v Taylor* [1993] 3 NZLR 403 (CA) at 418.

29 *Accent Management Ltd v Commissioner of Inland Revenue* (2013) 26 NZTC 21–016 at [32] citing *Clear Communications Ltd v Telecom Corporation of New Zealand* (1999) 14 PRNZ 477 (HC) at 483.

30 At 483.

31 *Fava v Aral Property Holdings Ltd* [2012] NZCA 585 at [34].

for all to see in the case on appeal and nothing that we have seen in the submissions from counsel give any support to this unfortunate allegation.

[63] Neither do we accept that Crown counsel has in any way deliberately acted to conceal exculpatory evidence from the appellant. The assurances given by Ms Laracy in her written submissions[32] demonstrate the contrary.

[64] Ms Laracy said that, having cooperated extensively in the ongoing requests for disclosure for a period of over two years, the time has come when the Crown cannot responsibly accede to further and repeated requests. The respondent now takes the view that, if the appellant wishes to make further disclosure requests, these should be advanced as formal applications to the Court as has been the case with the four categories of disclosure dealt with earlier in this judgment.

[65] We are not satisfied that there is any basis for removing Crown counsel from the conduct of the appeal. There are no extraordinary circumstances to justify that course. We should add that we consider that the application ought not to have been brought. Had the appellant been represented by counsel, such an application could not have been responsibly advanced.

Result

[66] All applications for further disclosure are dismissed.

[67] The application to remove Ms Laracy as counsel in the appeal is also refused.

Solicitors:
Crown Law Office, Wellington for Respondent

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[32] Discussed at [57] and [58] above.