

ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

INTERIM ORDER OF THE DISTRICT COURT SUPPRESSING ALLEGED FACTS REMAINS IN FORCE

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA704/2013
[2013] NZCA 597**

BETWEEN TATYANA KONDRATYEVA
Appellant

AND THE QUEEN
Respondent

CA705/2013

AND BETWEEN DONALD CRUICKSHANK
Appellant

AND THE QUEEN
Respondent

Hearing: 13 November 2013

Court: Wild, Simon France and Asher JJ

Counsel: M J Levett for Appellant Kondratyeva
J Mather for Appellant Cruickshank
T Simmonds for Respondent

Judgment: 29 November 2013 at 10 am

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B Order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest permitted.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] This is an application for leave to appeal against a pre-trial ruling of Judge Gibson of 3 October 2013 allowing a Crown application under s 344A of the Crimes Act 1961.¹ He held that evidence obtained by SPCA inspectors when they entered a part of premises occupied by the appellants had been obtained unlawfully, but was nevertheless admissible under s 30 of the Evidence Act 2006.

[2] The charges arose out of a visit by two police constables to the property owned by one appellant, Mr Cruickshank, following a dispute between Mr Cruickshank and the other appellant, Ms Kondratyeva, and trespass allegations. While they were there the police saw a number of sick looking cats living in highly unsatisfactory conditions. They notified the SPCA.

[3] In due course two SPCA inspectors arrived at the property. They were met by Mr Cruickshank who identified himself as the owner. Some minutes later the defendant Ms Kondratyeva appeared. The SPCA inspectors noted strong smells of ammonia, food and faeces and saw a number of injured or ill cats. There were 10 cats sighted in a caged area in a stairwell that led to a downstairs unit that was padlocked.

[4] The SPCA inspectors asked to go downstairs, but both Mr Cruickshank and Ms Kondratyeva said they did not have a key. They claimed that the key was with the person who was feeding the cats. They would not say who this person was. The

¹ *R v Kondratyeva* DC Auckland CRI-2011-044-4684, 3 October 2013.

SPCA inspectors indicated that if necessary they could get a warrant to go down the stairwell and inspect. After some repeated requests, the SPCA inspectors telephoned the police and asked them to assist.

[5] The two police constables who had visited the property earlier to deal with the domestic dispute returned. They spoke with Mr Cruickshank and Ms Kondratyeva. At that point Ms Kondratyeva produced a key to the padlock and unlocked the caged area. The officers proceeded downstairs to find a unit overflowing with faeces and urine that had accumulated over an estimated period of three to four months, and 23 cats which were trapped inside.

[6] At the hearing the Judge heard evidence. He found that contrary to Mr Cruickshank's evidence the SPCA inspectors and police had permission to go into the upstairs part of the house and inspect it. However, he held:²

Access to the downstairs area was not consented to. The accused resorted to a ruse to try and prevent the search. I am satisfied that it was only the inevitability of a search under warrant and the intervention of the police Constables that persuaded the accused to produce the key and then allow the inspection of the downstairs area to occur. Consent was not freely given.

...

Consequently I am satisfied that on the balance of probabilities, the evidence was improperly obtained, in that the evidence obtained as a result of the search under the warrant of 18 December 2010 would not have been obtained but for the warrant being based on information provided from the search of the downstairs unit and stairwell of the accused premises on the afternoon of the preceding day.

[7] Nevertheless, applying s 30 of the Evidence Act 2006 he admitted the evidence.

The unlawfulness of the search

[8] We are unable to agree with the Judge's decision that the search was unlawful. He made an affirmative finding that the inspectors had been invited to be upstairs.³ He made a finding that neither Mr Cruickshank or Ms Kondratyeva

² At [18] and [21].

³ At [14].

protested directly to the inspectors or the police.⁴ He made a finding that the appellants eventually abandoned their ruse, pretending they did not have the keys, when the police told them that they could seek a warrant. He found that the SPCA inspectors did not mislead the appellants, and that they could have sought and obtained a search warrant.⁵

[9] On the basis of these findings of fact the actions by the police and the inspectors appear to us to have been legitimate and not unfair. The warning that they could get a warrant indeed had the effect of alerting the appellants that they did not have to agree to the search taking place. Nevertheless, the appellants chose to produce the key and to open the room. Ms Kondratyeva accompanied the SPCA inspectors downstairs. The actions of her and Mr Cruickshank appear to us to indicate consent to the downstairs inspection. The search therefore appears to us to have been lawful.

[10] However, there has been no challenge by the Crown to the finding that the downstairs search was unlawful. For the purposes of this appeal, we proceed on the basis of that finding. The issue is therefore whether the Judge was right in permitting the evidence in his discretion under s 30.

The s 30 discretion

[11] Section 21 of the New Zealand Bill of Rights Act 1990 (the NZBORA) provides that everyone is to be secure against unreasonable search and seizure. Section 30(5)(a) of the Evidence Act 2006 deems evidence to be improperly obtained if it is obtained in consequence of a breach of any enactment or rule of law by a person to whom s 3 of the NZBORA applies. Section 3 of the NZBORA applies to any person performing a public function, power, or duty conferred or imposed on that person by or pursuant to law. The inspectors' power to inspect is provided by s 127 of the Animal Welfare Act 1999, and they exercise that power for the public good of ensuring the welfare of animals. They were performing a public function and exercising a public power.

⁴ At [17].

⁵ At [19] and [20].

[12] The discretion under s 30 to exclude improperly obtained evidence requires the Court to carry out a balancing exercise under s 30(2). The exclusion must be proportionate to the impropriety. This was the exercise undertaken by Judge Gibson.

[13] While the right to freedom from unlawful search is important as Mr Mather for Mr Cruickshank emphasised, the seriousness of the intrusion (if any) was minor. As we have set out, we are unable to see any indications of improper pressure or unfair conduct on the part of the police or the SPCA inspectors. Even assuming impropriety, it was right at the bottom end of the scale of seriousness. It cannot be said in terms of s 30(3)(b) that it was deliberate, reckless or done in bad faith. The inspectors would have thought that they had permission. The Judge's characterisation of the breach as he saw it as "not significant"⁶ was correct.

[14] The nature and quality of the improperly obtained evidence was of a high order. The eyewitness evidence was of highly distressed cats living in cruel conditions. The Judge was right to describe it as "compelling".⁷ Section 30(3)(h) makes "urgency in obtaining the improperly obtained evidence" one of the considerations in undertaking the s 30(2) exercise in undertaking the s 30(2) exercise. There was an element of urgency in the situation the officers faced. There were cats present that were clearly suffering grievously and in need of urgent attention. The use of any other investigative techniques would have led to delay.⁸

[15] Thus, any breach was minimal and the nature and quality of the evidence obtained compelling. The circumstances indicate good faith and an urgent need to alleviate suffering. The balancing exercise comes down clearly in favour of admission.

[16] Therefore we have no doubt that the evidence was properly admitted. There was no error in that assessment by the Judge.

⁶ At [23].

⁷ At [24].

⁸ New Zealand Bill of Rights Act 1990, s 30(3)(e) and (h).

Result

[17] The application for leave to appeal is dismissed.

[18] To ensure a fair trial, we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest permitted.

Solicitors:
Crown Law Office, Wellington for Respondent.