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.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA827/2013
[2014] NZCA 47

BETWEEN	BING LIN Appellant
AND	THE QUEEN Respondent

CA865/2013

BETWEEN	SEK HOE LEE Appellant
AND	THE QUEEN Respondent

Hearing:	11 February 2014
Court:	White, MacKenzie and Mallon JJ
Counsel:	N G Cooke for Appellant Lin A M O'Simperingham for Appellant Lee J M O'Sullivan for Respondent
Judgment:	3 March 2014 at 4.00 pm

JUDGMENT OF THE COURT

A The applications for an extension of time to appeal are granted.

B Leave to appeal is granted.

C The appeals are dismissed.

D 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 White J)

Introduction

[1] Bing Lin and Sek Hoe Lee face charges of possession of the Class B controlled drug pseudoephedrine for supply and of importation of pseudoephedrine. They seek leave to appeal against pre-trial rulings relating to the admissibility of evidence against them made by Judge McNaughton in the District Court at Manukau.[1]

[2] Mr Lin challenges Judge McNaughton's rulings that:

(a) evidence of the pseudoephedrine found by the police in a Toyota Celica motor vehicle Mr Lin was driving was admissible and not improperly obtained;[2] and

(b) his statements to the police admitting smoking cannabis and advising of the presence of a further quantity of pseudoephedrine drugs in the Toyota were admissible.[3]

[3] Mr Lee, who was a passenger in the Toyota, challenges Judge McNaughton's ruling that his statement to the police admitting involvement in the possession and importation of pseudoephedrine was admissible.[4]

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1 *R v Lee* DC Manukau CRI-2012-092-12769, 6 November 2013.
2 At [20]–[21].
3 At [22]–[38].
4 At [58]–[77].

Factual background

[4] Some two weeks before the Toyota was stopped and searched, the police had searched a residential property and found methamphetamine-related items in a room occupied by Mr Lee. A silver BMW motor vehicle was parked outside the property. The police formed the view that there was enough evidence to arrest Mr Lee for drug-related offences. It was also known that he was unlawfully residing in New Zealand.

[5] On the night the Toyota was stopped, the police had been following Mr Lee in an unmarked police car. He was seen in the Toyota when its occupants met with another known drug dealer. Later the police saw the Toyota pull into a petrol station and park by the silver BMW.

[6] As the Toyota pulled slowly into the petrol station, the police activated their flashing lights and siren briefly before stopping the Toyota from leaving the petrol station by parking behind it. Officers spoke to the occupants of the Toyota and searched it without a warrant. There is no dispute that before searching the vehicle the police failed to tell Mr Lin, the driver of the Toyota, under what statutory power the vehicle had been stopped, as they were obliged to when stopping a vehicle under s 314B(4)(b) and (c) and/or s 317A(3)(b) of the Crimes Act 1961.

[7] The evidence of the officer who spoke to Mr Lin was that, having noticed a smell of cannabis coming from inside the vehicle, he said to Mr Lin "there is a strong smell of cannabis. Have you smoked in your car today?" to which Mr Lin answered in the affirmative. Mr Lin was then given his rights by two police officers, one of whom, a Mandarin speaker, gave them in both English and Mandarin and explained to Mr Lin that he was going to search the vehicle and the occupants pursuant to s 18 of the Misuse of Drugs Act 1975.

[8] The warrantless search of the Toyota was then conducted under s 18(2) of the Misuse of Drugs Act.[5] The pseudoephedrine was discovered in a single bag

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[5] That provision was replaced by s 20 of the Search and Surveillance Act 2012 from 1 October 2012: Search and Surveillance Commencement Order 2012, cl 3(a) and (d).

containing four individual bags of pseudoephedrine in the boot of the Toyota. Mr Lin was arrested and again given his rights in both English and Mandarin.

[9] The subsequent report to the Commissioner of Police wrongly recorded that prior to the search the police believed there was pseudoephedrine (rather than cannabis) in the Toyota.[6]

[10] After being taken to the Manukau police station, Mr Lin, acting on legal advice, declined to make a statement, but, according to one of the officers, said that not all of the drugs had been located in the Toyota and that they should check under the driver's seat. Two further bags of pseudoephedrine were then located making a total of six bags comprising 2.268 kilograms with a street value of approximately $110,000 and capable of yielding significant quantities of methamphetamine.

[11] Mr Lee, who was a passenger in the Toyota, declined to make a DVD-recorded statement at the police station, but made an oral statement to the Mandarin-speaking police officer in which he was recorded as having admitted his involvement in the possession and importation of pseudoephedrine.

Submissions

[12] For Mr Lin, Mr Cooke reiterates the submissions made in the District Court that:

(a) evidence of the pseudoephedrine is inadmissible because, in terms of s 30(5)(a) of the Evidence Act 2006, the search of the Toyota was unlawful and the evidence has therefore been "improperly obtained"; and

(b) Mr Lin's statements are inadmissible because of the unlawful search of the Toyota and Mr Lin's denial of having made the statements.

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[6] The requirement to write a report to the Commissioner of Police was contained in s 18(6) of the Misuse of Drugs Act 1975 was replaced by s 169 of the Search and Surveillance Act. There was a period of overlap during the period of the alleged offending: s 169 came into force on 18 April 2012 (Search and Surveillance Act, s 2(1)) and s 18 was repealed as of 1 October 2012: Search and Surveillance Commencement Order, cl 3(d) and see Search and Surveillance Act, s 332.

[13] For Mr Lee, Mr Simperingham reiterates the submissions made in the District Court that Mr Lee's statement is inadmissible because he denied making it, but, if he had made it, it was unfairly obtained in breach of s 30(5)(c) of the Evidence Act and the Chief Justice's Practice Note on Police Questioning issued under s 30(6) of the Act.[7] Mr Simperingham also raises on appeal a new alternative ground for submitting that Mr Lee's statement is inadmissible, namely that it was not reliable and should therefore be excluded under s 28 of the Evidence Act.

An unlawful vehicle search?

[14] There is no dispute that the failure of the police to explain to Mr Lin why the vehicle he was driving had been stopped was a breach of s 314B(4)(b) and (c) and/or s 317A(3)(b) of the Crimes Act. This means that the evidence obtained from the search of the vehicle will have been "improperly obtained" for the purposes of s 30(5)(a) or (b) of the Evidence Act if it was obtained "in consequence" of that breach.

[15] Judge McNaughton decided that the evidence was not obtained "in consequence" of that breach. He said:

> [20] I am not satisfied that the evidence found in searching the Toyota Celica was obtained in consequence of an earlier unlawful stopping of the motor vehicle. Sek Hoe Lee had been driving the silver BMW earlier in the night. He left it at the Z station where he was met by Lin in the Toyota Celica and having spent two hours or so travelling around in the Celica it is a clear inference that he was being taken back to his vehicle. The Celica was about to park right next to the BMW.
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> [21] I am perfectly satisfied that the intention was to stop and let Mr Lee out so that he could get into the other vehicle. There was absolutely nothing to prevent the police waiting until the Toyota Celica had come to a complete stop and then approaching the driver and requesting his details and identification. Accordingly I am satisfied that the evidence was not improperly obtained on the basis of an earlier unlawful stopping of the motor vehicle, the evidence would have been obtained in any event.

[16] Mr Cooke's submission that the police errors were "not inconsequential" was based on a misapprehension as to the meaning of the requirement of s 30(5)(a) that the evidence be obtained "in consequence", that is as a result of, the breach.

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7 Practice Note on Police Questioning (s 30(6) Evidence Act 2006) [2007] 3 NZLR 297.

Mr Cooke's submission that the police had acted in bad faith or had stopped the vehicle for a collateral purpose was not supported by Judge McNaughton's factual findings.[8]

[17] The language of s 30 requires a causative link between any police impropriety and the procurement of the relevant evidence.[9] In this case the evidence (the pseudoephedrine) was obtained in consequence of a search conducted because one of the police officers said he "smelled cannabis" not as a consequence of the breach resulting from the failure to explain to Mr Lin why the vehicle had been stopped. The requisite connection between obtaining the evidence and the breach was not established.

[18] In any event, we agree with Ms O'Sullivan that, even if the pseudoephedrine had been obtained "in consequence" of the breach so that it was considered to have been "improperly obtained" under s 30(5)(a) of the Evidence Act, the exclusion of the evidence would not be proportionate to the impropriety in terms of the balancing exercise required by s 30(2)(b), having regard to the s 30(3) factors which are applicable in this case, namely:

(a) the breach of Mr Lin's right to be told why the Toyota was being stopped was not particularly serious in all the circumstances;

(b) it was not established that the breach was deliberate, reckless or done in bad faith;

(c) there is no dispute as to the nature and quality of the pseudoephedrine found in the Toyota;

(d) there is no dispute that the offences are serious (with a 14 year maximum penalty) and involved a drug which is a precursor substance for the manufacture of methamphetamine;

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8 *R v Lee*, above n 1, at [42] and see below at [21].

9 Compare *R v Shaheed* [2002] 2 NZLR 377 (CA) at [138] and [146] and *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [79].

(e) apart from seeking a search warrant, there were no other investigatory techniques available; and

(f) the pseudoephedrine is central evidence for the proof of the offences.[10]

[19] The pseudoephedrine found on the search of the Toyota therefore remains admissible in evidence notwithstanding the breach of s 314B and/or s 317A, provided the warrantless search of the vehicle was validly conducted.

A valid search under s 18(2) of the Misuse of Drugs Act?

[20] A warrantless search of a vehicle was able to be conducted under s 18(2) of the Misuse of Drugs Act if a constable held reasonable grounds for believing that there was a controlled drug or precursor substance in the vehicle and that an offence against the Misuse of Drugs Act had been or was suspected of having been committed in respect of that drug or precursor substance. It is well established that:

(a) the question whether a constable has reasonable grounds for holding the requisite belief is to be determined objectively;[11] and

(b) a police officer having smelt cannabis is a proper ground for "reasonable belief".[12]

[21] In the District Court Judge McNaughton rejected submissions for Mr Lin that the police had acted in bad faith and that the police officer who claimed to have smelt cannabis had fabricated his evidence. The Judge said:

> [38] I am perfectly satisfied that he [Mr Lin] did understand the questions that were put to him including a request for his name, date of birth, identification. I am satisfied he understood and [sic] Detective Sergeant Sarich's suggestion that there was a strong smell of cannabis coming from the car and that he understood the question "Have you smoked in your car today" as relating to cannabis. On Detective Sergeant Sarich's evidence

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10 *Hoete v R* [2013] NZCA 432 at [44]. Leave to appeal to the Supreme Court declined: *MacKenzie v R* [2013] NZSC 143.

11 *R v Laugalis* (1993) 10 CRNZ 350 (CA) at 354; *R v Williams*, above n 9, at [213]; and *Hoete v R*, above n 10, at [10].

12 *R v Harris* [2007] NZCA 390 and *Kree v R* [2010] NZCA 334.

there was no prevarication on the part of the driver, no attempt to clarify whether the question related to cannabis or cigarettes. I am satisfied that he answered the question directly and deliberately just as Detective Sergeant Sarich said he did.

[39] Counsel in their submissions placed some emphasis on the evidence of the other police officers none of whom smelt cannabis emanating from the car and in particular Detective Stirling who searched the car. It is clear on the evidence that Detective Li was at all times on the passenger's side. There is no evidence that the passenger's window was down or that the passenger's door was open for any length of time after Mr Lin [sic] the front seat passenger got out.

[40] Detective Stirling said he searched the vehicle at about 12.20am. He did not detect any smell of cannabis nor did he find cannabis or any implements for smoking cannabis. I do not regard that evidence as necessarily fatal to the prosecution case. It is perfectly possible that cannabis was smoked in the form of a cigarette without the use of a pipe or other smoking utensil and that the butt was simply discarded. No cannabis was found in the vehicle or in the possession of the occupants but there is no evidence as to whether they were individually searched and if they were searched, how extensive that search was. The absence of any cannabis in their possession does not exclude the possibility that whatever cannabis they did have, was consumed.

[41] There was a delay before the car was searched. It was 12.20 or shortly thereafter before the other two officers arrived and on arrival there was a further delay while they were briefed as to the situation and Detective Sergeant Sarich gave instructions in relation to the search. It may well be that over a period of time the smell has simply dissipated. I am certainly not prepared to reject the evidence of Detective Sergeant Sarich on the basis of anything said by Mr Lin or for that matter by Mr Lee who was equally unimpressive and unconvincing as a witness. He too said that no cannabis was smoked in the vehicle only Dunhill Blue cigarettes. He said he was unable to hear any conversation between Detective Sergeant Sarich and Mr Lin in relation to a smell of cannabis or a request to search the vehicle. For reasons which I will explain later, Mr Lee's evidence in relation to admissions made by him was a complete tissue of lies and anything he had to say in relation to the search of the motor vehicle I also absolutely reject.

[42] Although neither counsel actually went so far as to put to Detective Sergeant Sarich in cross examination that he had fabricated his evidence in relation to the smell of cannabis, both counsel in submissions urged me to find that he did, and that there was bad faith on the part of the police. Under cross examination and in answer to questions from the Court Detective Sergeant Sarich was forthright and somewhat contrite in explaining his actions that night. He frankly conceded that with the benefit of hindsight he could have waited longer before terminating the operation and that having taken the decision to stop the vehicle he should have carefully explained his reasons to the driver. He accepted that he was under a degree of pressure, that there were a number of different factors to consider and that he made a number of mistakes. This was certainly not a stellar performance by a police officer of 17 years experience holding the rank of Detective Sergeant and leading a specialist squad. But despite the Detective Sergeant's

> shortcomings in an operational sense I am far from persuaded that he was dishonest or misleading the Court in his evidence.

[22] On the issue of the erroneous reference to pseudoephedrine (rather than cannabis) in the report to the Commissioner, Judge McNaughton said:

> [46] Detective Sergeant Sarich said the form was normally filled out by the officer in charge of the officer who executed the search but it was not uncommon for other officers to complete the form on their behalf "just to make things move along a bit faster". He said the document would need to be completed with his log in but if he was already logged onto a computer then anything subsequently completed and submitted would show up with his name on it. He said he did not believe that he had completed the form because the drug searched for was not pseudoephedrine but cannabis and he said he was unaware of the quantity Contac NT granules found because Detective Stirling had taken the drugs with him and he did not know its weight.
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> [47] In answer to questions from the Court Detective Sergeant Sarich denied that search of the vehicle without warrant for pseudoephedrine was predetermined before it was stopped. He said the drug the police was searching for was cannabis not pseudoephedrine. He said he may have completed the form himself but he didn't think so and there was a method of submitting a document on behalf of another officer but he didn't know how to do it himself.
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> [48] This document is a further indicator of some very sloppy police work within this particular squad. Detective Li failed to make a contemporaneous record of his interview with Mr Lee. The crucial admission by Mr Lin in relation to a [sic] another quantity of pseudoephedrine in the car was not recorded by either Detective Sergeant Sarich or Constable Lan. None of the police officers attending at the Rautara Street address two weeks earlier completed any paper work in relation to the finding of methamphetamine or drug utensils at that address.
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> [49] What emerges from the evidence is an abject failure on the part of a number of officers in this squad to keep proper records. In the end I cannot be sure that in fact it was a document created by Detective Sergeant Sarich and it may well be as he says another officer in his squad who has misunderstood the basis for invoking s 18(2) in this instance.

[23] The Judge then concluded:

> [50] On the balance of probabilities I am satisfied that Detective Sergeant Sarich did detect the smell of cannabis coming from the car and he did invoke s 18(2) of the Misuse of Drugs Act on that basis. The evidence was not improperly obtained and the search was lawful.

[24] We are satisfied that the factual findings made by Judge McNaughton on the evidence that he heard were open to him and that there is no basis for us to go behind

his respective findings of credibility on this issue, especially when counsel for Mr Lin and Mr Lee failed to cross-examine the police officer concerned on the fabrication allegation as required by the Evidence Act.[13] In these circumstances there was no evidential basis for Mr Cooke to pursue on appeal his submissions of bad faith and evidence fabrication on the part of the police. As Ms O'Sullivan submitted, it was open to the Judge to accept the evidence of the police officer as credible and reliable notwithstanding the error in the report and the absence of any corroborative evidence.

[25] The search of the Toyota under s 18(2) was therefore a valid search and the evidence was, at least in relation to this point, not improperly obtained.

Mr Lin's admissions admissible?

[26] After hearing evidence from Mr Lin and the police officer concerned, Judge McNaughton found that Mr Lin had made the statements admitting smoking cannabis and advising of the presence of further drugs in the Toyota. In making these findings, the Judge accepted the evidence of the police officer and rejected Mr Lin's evidence denying having made the statements because he did not understand the questions put to him in English. The Judge said:

> [33] It is simply inconceivable that after two years formal education in China and six months education here in New Zealand and four years living in New Zealand that Mr Lin had no comprehension of English beyond a request for his name, date of birth and identification and I reject that evidence out of hand.
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> [36] The respondents alleged admissions were not recorded either by Detective Sergeant Sarich or the officer assisting with interpretation, Constable Kay Lan. Mr Lin denied making these admissions point blank.
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> [37] Again I have no hesitation in rejecting his evidence in this regard either. Having thoroughly searched the vehicle first time round the police had absolutely no reason to go back and do it again on the basis that they might have missed something. I am perfectly satisfied that the reason Constable Stirling travelled back to the Z petrol station just after 5.00am some five hours after the initial search was because of information provided by Mr Lin. Overall I found Mr Lin to be a thoroughly dishonest and unreliable witness. I do not accept his evidence on any issue.

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[13] Evidence Act 2006, s 92 and *Hoete v R*, above n 10, at [13].

> [38] I am perfectly satisfied that he did understand the questions that were put to him including a request for his name, date of birth, identification. I am satisfied he understood and Detective Sergeant Sarich's suggestion that there was a strong smell of cannabis coming from the car and that he understood the question "Have you smoked in your car today" as relating to cannabis. On Detective Sergeant Sarich's evidence there was no prevarication on the part of the driver, no attempt to clarify whether the question related to cannabis or cigarettes. I am satisfied that he answered the question directly and deliberately just as Detective Sergeant Sarich said he did.

[27] Again we are satisfied that these findings were open to Judge McNaughton on the evidence that he heard and that there is no basis for going behind his respective findings of credibility on this issue. We note that in making these findings the Judge took into account the poor police practice in this case, but correctly decided on the basis of the evidence that he accepted that Mr Lin had made the statements.

[28] Once it is accepted, as it is by us, that Mr Lin made these statements and that the search of the Toyota was not of itself unlawful, then, like the evidence of the pseudoephedrine found in the vehicle, there is no basis for ruling the statements inadmissible as improperly obtained. Allegations of bad faith against the police have not been substantiated.[14]

[29] Furthermore, we agree with Ms O'Sullivan that, even if the admissions had been "improperly obtained" in consequence of an unlawful vehicle search, they would, like the pseudoephedrine, be admissible under s 30(2) of the Evidence Act. A similar balancing exercise would produce the same result.[15]

[30] None of Mr Cooke's submissions has persuaded us that there is any reason to differ from the decision of Judge McNaughton that Mr Lin's admissions are admissible.

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[14] See above at [24].
[15] See above at [18].

Mr Lee's admissions admissible?

[31] In the District Court Mr Lee's initial position was that the statement attributed to him had in fact been made by another passenger in the Toyota, Mr Cao.[16] This submission was rejected by Judge McNaughton:

> [65] Despite the obvious shortcomings in the [police] note taking I have no difficulty in accepting Detective Li's evidence in preference to that of Mr Lee. There is no evidence that Detective Li ever spoke to the passenger Cao. Detective Bull who formally interviewed Cao said no other police officers spoke to him at the Manukau Police Station before he was released.
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> [66] On the face of it, it is utterly implausible that the police having obtained admissions from one potential suspect would then seek to attribute those falsely to another. Secondly I do not accept Mr Lee's claim that he was never afforded the opportunity of a DVD interview. If that was the case there was absolutely no reason for Detective Li to take him into a room containing a DVD recording machine. This interview could have occurred anywhere in the police station.
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> [67] Third, much of the information in the detective's notebook was confirmed by Mr Lee himself in cross examination. He conceded that there were names and telephone numbers in his phone which corresponded to notes made by the detective. He was completely unable to explain how the detective could have accessed his address book without the password which was required to use the phone whenever it had turned itself off. He said he did not provide Detective Li with the password.
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> [68] At the conclusion of Mr Lee's evidence I was left with the very clear impression that he was simply embarrassed by the admissions made and in particular his identification of other drug suppliers higher up the food chain and the only way to distance himself from the admissions recorded was to suggest that they came from someone else, however implausible that suggestion might be. I am perfectly satisfied that the information recorded in the detective's notes and subsequently fleshed out in more detail in the detective's formal written statement came from the respondent and not Mr Cao.

[32] Mr Lee's alternative position in the District Court was that the statement was taken unfairly due to both the mode of recording in breach of the Chief Justice's Practice Note and because the Judge failed to place "sufficient weight" on Mr Lee's language abilities. These submissions were also rejected by Judge McNaughton:

> [75] Clearly Detective Li's note taking was inadequate. Ideally he should have recorded in Mandarin questions put and answers received. Attempting to reconstruct these brief notes into a formal statement two weeks after the event leaves his recollection of the interview open to challenge in terms of

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16 *R v Lee*, above n 1, at [62].

> accuracy and if the admissions are admissible a jury ultimately may have some difficulty assessing the weight of his evidence.
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> [76] However in terms of unfairness I am satisfied that Detective Li did everything he could to facilitate access to the lawyer of Mr Lee's choice. I am satisfied that he offered the option of the DVD interview which the accused declined. It is perfectly clear from what occurred prior to the notebook interview commencing at 2.32am that Mr Lee was well aware of his right to silence and his right to seek legal advice. I am satisfied that he waived both rights in an endeavour to obtain gain [sic] police assistance with his immigration matters. I am satisfied that he knew the detective was making notes which he would have seen the officer recording his notebook. I am satisfied that the admissions made were free and voluntary.
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> [77] Compliance with the Practice Note is a matter which a Judge must take into account in assessing unfairness but it is not the only issue and it is not the dominant issue. Detective Li did what he could to ensure that the notes were accurate by reading them back to the accused interpreted in Mandarin but he refused to sign. In the end I am satisfied there is no unfairness. The statement was not improperly obtained and is admissible.

[33] Recognising the inconsistency between the two positions adopted by Mr Lee in the District Court,[17] Mr Simperingham accepted on appeal that Mr Lee had made the statement to the police officer. Mr Simperingham reiterated, however, Mr Lee's alternative submission that the statement had been taken unfairly and also advanced the new ground of unreliability based on s 28 of the Evidence Act. We are not persuaded by either submission.

[34] On the issue of unfairness, we are again satisfied that the factual findings made by Judge McNaughton were open to him on the evidence and that there is no reason for us to go behind his respective findings of credibility on this issue. Consequently, we also agree with Judge McNaughton for the reasons he gave that there was in fact no breach of the Chief Justice's Practice Note and that Mr Lee's statement was not improperly obtained and is admissible.

[35] Furthermore, we again agree with Ms O'Sullivan that, even if the statement had been "improperly obtained", it would be admissible under s 30(2) of the Evidence Act for reasons similar to those referred to in relation to the balancing exercise for the admissibility of the pseudoephedrine.[18]

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17 See *R v Whareumu* [2000] 1 NZLR 655 (CA) at [19] per Keith J.

18 See above at [18].

[36] On the new issue of unreliability based on s 28, we agree with Ms O'Sullivan that Mr Lee should not be permitted to advance this ground for the first time on appeal. Before an objection of this nature may be advanced, Mr Lee should comply with his obligations under Practice Note 14 on Pre-Trial Applications in High Court and District Court Criminal Jury Cases.[19] Mr Lee is required to provide the grounds for his objection, its "evidential foundation" and supporting evidence.[20] The Crown is then entitled to call evidence in response and to require the issue to be determined first by the trial court in the usual way. It is still open to Mr Lee to pursue this issue in the proper manner in the District Court if he wishes.[21]

[37] We therefore uphold Judge McNaughton's decision as to the admissibility of Mr Lee's statement.

Result

[38] For the reasons given, the applications for an extension of time to appeal are granted, leave to appeal is granted, but the appeals are dismissed.

[39] For fair trial reasons, there will be 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

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19 Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [14–131].

20 Evidence Act, s 28(1)(a).

21 See Crimes Act 1961, s 344A(4) (as it was at the time). This Court's power to receive evidence in s 379A appeals is in any event doubtful: compare *Taylor v R* [2010] NZCA 333 at [7] and *Arnerich v R* [2012] NZCA 291 at [17]. We note successive appeals to the Court of Appeal on pre-trial maters are not to be encouraged: see *R v Grace* [1989] 1 NZLR 197 (CA) and compare: *R v Shailer* [2009] NZCA 436 at [20].