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NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA8/2016
[2016] NZCA 185

BETWEEN	DAVID STANLEY JONES Appellant
AND	THE QUEEN Respondent

Hearing:	4 April 2016
Court:	Wild, Clifford and Brewer JJ
Counsel:	R J Stevens and R M Gibbs for Appellant A J Ewing for Respondent
Judgment:	9 May 2016 at 10.30 am

JUDGMENT OF THE COURT

A The application for leave to appeal is granted and the appeal is allowed.

B The police evidence of what the defendant is alleged to have said to Detective Constables Fleischanderl and Khanna on 17 September with regards to the "washing" incident is excluded at his trial.

C Order prohibiting publication of the judgment and any part of the proceeding (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 Clifford J)

Introduction

[1] David Stanley Jones faces 89 charges relating to conduct whilst caregiver to a married couple (P and C). Eighty-six of those charges involve allegations of dishonesty: the complainants say Mr Jones dishonestly obtained a total of $6,111.59 from them. This appeal does not relate to those charges. Mr Jones also faces three charges of sexual offending against the female complainant, C: one of sexual violation by unlawful sexual connection (digital penetration of genitalia); and two of indecent assault. It is to those charges that this appeal relates.

[2] In a pretrial ruling of 4 December 2015 Moore J upheld Mr Jones' challenge to the admissibility of statements made in a DVD interview conducted by the police immediately after Mr Jones' arrest.[1] The Judge, however, declined Mr Jones' challenge to the admissibility of two other statements made to the police approximately one week later. Mr Jones now applies for leave to appeal that aspect of Moore J's decision.

Facts

[3] Mr Jones was appointed the complainants' caregiver in November 2011. The complainants are a married couple and live together in a supported environment. Both of them are intellectually disabled and suffer from epilepsy. The male complainant, P, also suffers from Downs Syndrome and diabetes. While he was their caregiver, Mr Jones was in full control of the complainants' day to day activities. He had full knowledge of their personal affairs. They were, the police allege, not even permitted to speak to anyone in his absence.

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1 *R v Jones* [2015] NZHC 3056.

[4] The couple's allegations against Mr Jones were brought to the police's attention in October 2013. C gave her first evidential interview on the 30th of that month. As regards the three charges of sexual offending, the Crown claims that Mr Jones arrived at the complainants' home with alcohol, which he then drank. After that he told the complainants he would instruct them on how to have sex. It is alleged he took the complainants into their bedroom. There he told P to sit in a chair beside the bed and watch. He then directed C to remove her clothes, lie on the bed and open her legs. He removed his own clothes. It is claimed he then told her to hold his penis and to rub it whilst he inserted two fingers into her vagina. It is also alleged that he kissed one of her breasts.

[5] On 10 September 2014 Mr Jones, then aged 75 and with no criminal record, was arrested and taken to the Manukau Police Station. Mr Jones spoke to a lawyer, was advised not to make a statement to the police and confirmed to the officer who had arrested him, a Detective Constable Khanna, that that was his decision. Notwithstanding, DC Khanna then proceeded to put the detail of the complainants' allegations to Mr Jones. As the interview progressed, increasingly detailed answers and explanations were elicited from Mr Jones. As relevant, Mr Jones told DC Khanna he could explain what had happened in relation to the sexual allegations. Mr Jones said that he used to watch pornography, and did so using P's computer. He said he had showed pornography to P and told him that he should "look at these stupid people on here and all those stupid things" they were doing. He said further that on one occasion the complainants had called him into their bedroom. They had then asked him to show them what married people did when they were having sex. Mr Jones said that he had told them he could not possibly do that: that he would lose his job and would get locked up. He said that, on that occasion, C was already undressed. He denied that he had touched C, or that C had touched him.

[6] Moore J held that DC Khanna's actions during that interview amounted to an inappropriate undermining of Mr Jones' right to silence. Mr Jones' subsequent revocation of that right was, the Judge held further, neither voluntary, informed nor unequivocal. On that basis, the Judge excluded evidence of Mr Jones' statement about watching pornography and being asked by the complainants to show them how to have sex. There is no challenge to that decision.

[7] After his arrest, Mr Jones was released on bail.

[8] On 17 September 2014, and in breach of his conditions of bail, Mr Jones was present at the offices of a local intellectual support unit. DCs Khanna and Fleischanderl went to the centre and arrested Mr Jones. It was agreed that DC Fleischanderl would drive with Mr Jones in Mr Jones' car to Mr Jones' home. DC Khanna would follow. They would leave Mr Jones' car at his home, and proceed together in the police car to the station.

[9] It was after his arrest, and whilst he was being transferred to the station, that Mr Jones made the two statements that are at issue here. Moore J recorded matters in the following way:

> [67] On the morning of 17 September 2014 Detective Constables [Fleischanderl] and Khanna were directed to the offices of Access Home Health in Howick. They had been tasked to arrest Mr Jones in relation to breaching a condition of his bail. On their arrival Detective Constable Khanna spoke with Mr Jones in the carpark and shortly afterwards arrested him for breach of bail. Mr Jones was told why he was being arrested. He was cautioned and given his rights under NZBORA. At this point Detective Constable Khanna went into the office leaving Mr Jones in the custody of Detective Constable [Fleischanderl]. The two men were seated in Mr Jones' car. Apparently due to the change in custody, the officer re-cautioned Mr Jones and gave him his NZBORA rights. Detective Constable [Fleischanderl] asked Mr Jones if he understood. He replied he had been given his rights the previous week by Detective Constable Khanna when he had talked to the officer about the charges.
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> [68] Detective Constable [Fleischanderl] said that Mr Jones volunteered to him that he had been the complainants' caregiver and they had made sexual allegations against him. He said he was likely to lose his job and due to his age he would have difficulty finding new employment. The comments were unprompted and spontaneous.
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> [69] According to Detective Constable [Fleischanderl] Mr Jones went on to speak about the complainant, C. He said that she and her partner were quite unhygienic and needed help in bathing. Mr Jones said he demonstrated on C how to bathe. Mr Jones is also claimed to have said he cleaned around C's "fanny" area. As he said this he demonstrated a scrubbing motion to Detective Constable [Fleischanderl].
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> [70] The officer made no comment to these remarks but when Detective Constable Khanna returned approximately 10 minutes later he briefed him on what Mr Jones had said.
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> [71] Detective Constable [Fleischanderl] said he recorded the conversation in his notebook either during the conversation or directly after he left the car to speak with Detective Constable Khanna. At the time of the

> hearing before me he did not have his notebook available because it was in storage at his home and he had been called to give evidence at short notice and was unable to find it in time. But he did transfer the notebook notes to a written statement he completed later the same day.
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> [72] Because Mr Jones was with his car and the Police needed to take him to the Manukau Police Station for post-arrest processing, arrangements were made to drive Mr Jones home where he could leave his car before being taken through to the Police station. After leaving the car at Mr Jones' home the three men carried on to the Manukau Police Station. Detective Constable [Fleischanderl] drove and Detective Constable Khanna and the defendant were seated in the back.
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> [73] Not long after they left Mr Jones' home Detective Constable Khanna showed Mr Jones an email and asked him questions about it. This [led] the officer to ask Mr Jones if he knew one of his bail conditions was not to access a computer. Initially Mr Jones replied, "Yes" but changed this to, "No". The officer recorded this exchange in his notebook, read back what he had written, including the change, and invited Mr Jones to sign the notes which he did.
>
> [74] The balance of the drive was undertaken in silence until, shortly before arriving at the Police station, Mr Jones apparently abruptly volunteered that C was very smelly "down under". He said he had done a lot for the couple and treated them like his babies. He said about 16 to 18 months before he had taught C how to wash her "fanny" using his fingers and washing her "down under". Detective Constable Khanna told him he was noting everything down because Mr Jones was under caution and reminded him that he did not have to say anything.
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> [75] As the officer was recording these comments he saw that Mr Jones was looking over his shoulder at what he was writing.
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> [76] On Detective Constable Khanna's account he was reading the notes back to Mr Jones as the car stopped at the sally port of the custody unit and they were getting out. He did not ask Mr Jones to sign the notes.

[10] In evidence before Moore J, Mr Jones denied the accuracy of the written statement DC Fleischanderl had completed later that day. He said he would not have used the word "fanny" because it was not in his vocabulary. He denied he had said anything about teaching C to wash herself, or using his fingers to do so. Mr Jones similarly challenged DC Khanna's record of what he had said. Again, he said he never used the word "fanny", and he had never used his fingers to wash C. In cross-examination, and whilst he maintained his denial as to his use of words as recorded by the Detective Constables, he did say that each of the complainants was very unhygienic and smelly, and that he had said to them they needed to pay attention to their personal hygiene and needed to bath correctly.

[11] In their evidential interviews, each of P and C said that Mr Jones would tell them to be careful to wash their genitalia so that they did not smell. He would do so standing at the bathroom door, or in the bathroom itself, whilst they were (separately) showering or in the bath. Neither said that Mr Jones had washed C's vagina using his fingers.

The challenged High Court decision

[12] In challenging the admissibility of his remarks to DCs Fleischanderl and Khanna on 17 September, Mr Jones said that the evidence of those statements was obtained in breach of the Chief Justice's Practice Note and was, in any event, irrelevant.[2]

[13] The Crown's position was that any breach of the Practice Note was relatively minor. Moreover, the evidence was of high probative value. The Crown case is that what Mr Jones said that day was a fabrication. That is, it was a lie: it was made up to provide the basis for an innocent explanation of the statements made by the complainants which formed the basis of the charges of unlawful sexual connection and indecent assault. If at trial the complainants' evidence was to change to become more consistent with those remarks, or indeed the jury were to reject the "lie" proposition, then the evidence could properly be considered as propensity evidence as regards the allegation of sexual offending.

[14] In declining to exclude this evidence, Moore J first held that any breach of the Chief Justice's Practice Note on the police statement was relatively minor in the circumstances. Whilst it was regrettable that neither officer gave Mr Jones the opportunity to check the notes they made and to adopt them by signing, both statements were voluntary, completely spontaneous and not made as a result of either officer raising the issue or prompting Mr Jones. Mr Jones was fully aware of his rights, and in particular his right not to make a statement. Mr Jones had not materially challenged the substance of his statements. Moreover he had not denied that DC Khanna had read his notes back. Mr Jones' evidence simply was that he could not remember that. Finally, his statements were not lengthy.

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2 *Practice Note — Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297.

[15] On that basis, the Judge was satisfied that the statements had not been obtained unfairly or improperly.[3]

[16] The Judge went on, however, to consider under the s 30 balancing test what the outcome would have been if he had reached the opposite conclusion. Any criticism of the officers was confined to their failure to have Mr Jones sign their notes. Both of them had recorded the comments made by Mr Jones and had read back the notes they had made to him. They had not acted deliberately, recklessly or in bad faith. The evidence was of a reasonable quality. Sexual violation was a serious offence. The balancing exercise therefore counted in favour of admission.

[17] Moore J then considered Mr Jones' more general challenge to the admissibility of the evidence of the statement, namely that it was of no relevant probative value.

[18] Reflecting his earlier analysis, the Judge agreed with the Crown's propositions. First the evidence tended to establish that Mr Jones, by his own admission, had touched C's vagina "albeit in a different setting".[4] At the same time, it might be seen as Mr Jones' attempt to create an innocent context in which his touching of C's vagina might be regarded as legitimate. The probative value was, therefore, reasonably high. Any prejudice would be low: the Crown's only allegation of improper touching was that reflected in the charges laid.

Appeal

[19] For Mr Jones, Mr Stevens argued that the Judge had erred in his assessment of the extent to which the police had failed to comply with the Practice Note. Balancing the true extent of that failure with what Mr Stevens says was the low probative value of the evidence, or alternatively making an assessment under ss 7 and 8 of the Evidence Act 2006 of relevance, probative value and unfair prejudice, the evidence should have been excluded.

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3 *R v Jones*, above n 1, at [102], applying the Evidence Act 2006, s 30(5)(c) and (6).
4 At [113].

[20] The Crown acknowledged the officers' failure to comply with the Practice Note may have been more extensive than the Judge had recorded. Nonetheless the Judge's overall conclusion was correct. As a fabrication, the evidence was materially probative: it tended to establish Mr Jones' guilty mind. Mr Jones had lied to establish a basis for an innocent explanation of the alleged offending. Given that the Crown was not asserting Mr Jones had in fact himself washed C's vagina, there would be little or not unfair prejudice associated with the evidence of that statement. The Crown accepted, however, that a lies direction would need to be given. The Crown also accepted that it would have to put to the complainants what Mr Jones had said to the police. If the jury accepted that Mr Jones had made that statement to the police, but that he was not lying — including on the possible basis that the complainants agreed that he had touched C as described, then the evidence would be propensity evidence. It showed a tendency to touch C in a way that an ordinary member of the public would find indecent.

Analysis

Section 30 of the Evidence Act and the Chief Justice's Practice Note

[21] Pursuant to s 30 of the Evidence Act, if a judge determines that evidence has been improperly obtained, he or she must go on to determine whether or not exclusion of the evidence is the proportionate response to the impropriety. Subsections (5) and (6) of the section provide:

> (5) For the purposes of this section, evidence is **improperly obtained** if it is obtained—
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> (a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies; or
>
> (b) in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution; or
>
> (c) unfairly.
>
> (6) Without limiting subsection (5)(c), in deciding whether a statement obtained by a member of the Police has been obtained unfairly for the purposes of that provision, the Judge must take into account guidelines set out in Practice Notes on that subject issued by the Chief Justice.

[22] The Chief Justice issued her Practice Note on 16 July 2007. Following an introduction that places the Practice Note in the context of the former Judges' Rules and the New Zealand Bill of Rights Act 1990, five requirements are stipulated. The first four of those prevent unfairness in the way police question suspects. Given the accepted spontaneity of the 17 September remarks, those matters are not in issue here. Rather it is the fifth requirement which, for Mr Jones, Mr Stevens submits was breached in material ways. That provides:[5]

> (5) Any statement made by a person in custody or in respect of whom there is sufficient evidence to charge should preferably be recorded by video recording unless that is impractical or unless the person declines to be recorded by video. Where the statement is not recorded by video, it must be recorded permanently on audio tape or in writing. The person making the statement must be given an opportunity to review the tape or written statement or to have the written statement read over, and must be given an opportunity to correct any errors or add anything further. Where the statement is recorded in writing, the person must be asked if he or she wishes to confirm the written record as correct by signing it.

[23] Speaking in relation to cl 5, this Court has observed:[6]

> Departures from that practice are to be deplored. When the preferred video procedure cannot feasibly be complied with, there are equally obvious reasons for complying with the final three sentences. Failure to do so places a grave impediment in the way of due process, compelling judges of first instance to make factual findings as to the credibility of police officers and appellate courts to reflect on why, if the truth has been told, such simple precautions were not taken.

[24] Nevertheless, a breach of the Practice Note will not necessarily lead to a finding of unfairness. As s 30(6) makes clear, a breach is a factor to be taken account of by the Judge in making her assessment of impropriety. Moreover, where a breach does lead to a conclusion of unfairness, and hence impropriety, the balancing exercise must still be undertaken to determine admissibility.

What the police did

[25] As Mr Stevens submitted, and the Crown acknowledged, the police's lack of compliance with the Practice Note was more extensive than the Judge

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5 *Practice note*, above n 2.

6 *R v Antonio* [2009] NZCA 359 at [46].

acknowledged. There is no question but that Mr Jones was in police custody. Accepting that it was not practical to record his statement by video or on audio tape, the cl 5 requirements were:

(a) The statements were required to be recorded permanently in writing.

(b) Mr Jones was required to be given an opportunity to review that written statements, or to have them read over to him.

(c) Mr Jones was also required to be given an opportunity to correct any errors, or add anything further.

(d) Finally, Mr Jones was required to be asked if he wished to confirm the written record of the statements as correct by signing them.

[26] As a matter of fact:

(a) DC Fleischanderl said he recorded Mr Jones' statement in his notebook either during the conversation or directly after he left the car to speak with DC Khanna.

(b) He was not, however, able to produce his notebook. He had prepared a written statement later that day, which he did produce: that was a narrative of what had occurred, rather than a verbatim record of Mr Jones' statement itself.

(c) DC Fleischanderl:

(i) confirmed that he had not shown the notes he made in his notebook to Mr Jones to review and correct or supplement;

(ii) acknowledged he knew he was obliged to;

(iii) acknowledged he now could not recall what it was that Mr Jones had said to him;

(iv) acknowledged that, as he drove to Mr Jones' home address with him in Mr Jones' car, he could have shown Mr Jones his notes and asked him to comment on them; and

(v) acknowledged he had not asked Mr Jones if he wished to confirm the written record as correct by signing it.

[27] DC Khanna sat in the back seat of the police car with Mr Jones on the way from Mr Jones' house to the police station. As that journey began, Mr Jones asked the Detective Constable how he had breached his bail conditions. A relatively brief exchange occurred. DC Khanna recorded the questions and answers involved, read them back to Mr Jones and Mr Jones signed those entries as correct. Thereafter they drove in silence for a while. Some ten minutes later, DC Khanna said that "all of a sudden" Mr Jones began talking again. The Detective Constable's evidence was that he recorded those remarks in his notebook and in his evidence in chief he said:

> I put in my notebook he said that "[C] was very smelly down under, I have done a lot of things for this couple, treated them like my babies. I think about 16 to 18 months ago I taught her how to wash her fanny, I literally used my fingers and washed her down under," and at this stage I told him, "I'm noting down everything because you are under caution and you know whatever you say," I reminded him these things and thereafter he didn't say anything and by this time we had already reached Manukau Police Station.

[28] The Detective Constable went on to say that, as they arrived at the police station, he had read his notebook record back to Mr Jones. He had not, however, asked him to sign it, because essentially he did not have time. In cross-examination the Detective Constable confirmed that in his evidence before Moore J he had for the first time said he had read his notebook entry back to Mr Jones. That statement was not recorded in the notebook itself (in contrast to his record of the exchange 10 minutes previously) nor in the detailed statement he made later that day.

[29] The following exchange then occurred between Mr Stevens and the Detective Constable:

> Q. I put it to you detective that you can't recall reading these notes back to Mr Jones.
>
> A. I did it, that's all.

Q. If you had read the notes back to Mr Jones at the time you would have given him the opportunity to comment on them and sign them as correct, wouldn't you?

A. Can't say anything.

[30] As can be seen, there was considerably more to the Detective Constables' failure to comply than a failure "to have Mr Jones sign their notes".[7] DC Fleischanderl did not claim to have read his notes back to Mr Jones. Nor was his statement a verbatim record. Neither officer gave Mr Jones an opportunity himself to read or correct the notes. Nor was he invited to sign them as correct.

Reliability, relevance and prejudice

[31] There does not appear to have been any practical reason why DC Fleischanderl, who says he made his notes in the passenger seat of Mr Jones' car on his way to Mr Jones' house, did not comply. DC Khanna says he did not because of the practical implications of arriving at the police station just after the comment was made. We acknowledge that possibility. Nevertheless the Court was left with credibility assessments of the very type compliance with the Practice Note was designed to obviate.

[32] By our assessment, therefore, the evidence that the non-complying written records constitutes has, in terms of the Practice Note, been improperly obtained. Relative to the procedures required by the Practice Note, as evidence those written records can be said to be defective. That is, by not having been put to Mr Jones in the required way, the statements suffer from the "impediment in the way of due process" referred to in *R v Antonio*.[8] As there, the question is raised as to why, if indeed the truth has been told, such simple precautions as those called for by the Practice Note were not taken.

[33] A finding that because of a breach of the Practice Note evidence has been unfairly obtained leads, in terms of s 30, to the balancing exercise. That exercise focuses on the importance of the rights breached by the impropriety, and the seriousness and nature of the impropriety relative to the nature and quality of the

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7 *R v Jones*, above n 1, at [104(a)].

8 *R v Antonio*, above n 6, at [46].

improperly obtained evidence. Under s 30, those assessments are to be made in the context provided by the seriousness of the offending and other aspects of the police investigations.

[34] Here, the impropriety does not go to the circumstances that gave rise to the statement, but the form of the written record that the police wish to adduce in evidence. The breach of the Practice Note, the impropriety, has affected the quality, the credibility and reliability of the evidence. In our view, those issues are more logically dealt with in a ss 7 and 8 analysis (relevance, and probative value versus unfair prejudice) than they are under a s 30 balancing exercise.

[35] Whether taken as a lie or a true statement, the evidence of what Mr Jones is alleged to have said is of relatively limited relevance. That is, it does not have a strong tendency to prove anything that is of consequence to the determination of the proceedings. Seen as a lie, the Crown's explanation — that Mr Jones did so to create an innocent explanation for the allegations — is a possible inference. But, as the necessary lies direction would record, people lie for all sorts of reasons.[9] As an elderly man of 75, encountering the police as a suspect for the first time, it is an obvious enough proposition that Mr Jones would have been under considerable stress and could well have been confused or flustered. If, complicating matters considerably, the jury concluded — as they would be entitled to — that if Mr Jones had made that remark, that when he did so he was telling the truth, what would they make of it? The Crown suggests it has value as propensity evidence. That is perhaps so, but any such value would be very limited, as the remark pertains to a seemingly well-intentioned, albeit inappropriate, touching, as opposed to a sexually-motivated indecency.

[36] But, in either context, the prejudicial value of that inappropriateness is, in our view, high. The evidence is, put frankly, unpleasant: it places Mr Jones in a bad light. Even if advanced by the Crown as a lie, we think considerable unfair prejudice attaches to it. In our view that unfair prejudice outweighs any limited probative value.

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[9] Evidence Act, s 124(3)(b).

[37] There is also, in our view, a real risk of prejudice to the proceedings. The introduction of this evidence could well become something of a side show. First, there is the difficulty of the Crown's "lie theory" in and of itself. The necessary lies direction confirms that. The trial Judge would also be required to deal, in the alternative, with the propensity issue. We note that it was only after some effort on our part that the Crown was in a position to clarify the alternative use of the evidence. The Crown recognised the associated complexities, and made the submission that, at the end of the day, it would be unlikely that those alternative uses would both be before the jury. That is possible: some form of voir dire of this evidence might clarify matters, particularly as regards the possibility of the complainants changing their evidence and confirming the alleged statement by Mr Jones. But the possibility would remain, and would have to be dealt with by the Judge, that notwithstanding the Crown's lie theory, the jury could in fact conclude that Mr Jones had acted as he had said and was attempting to use that fact (perhaps honestly) to explain the allegations against him.

[38] We are therefore satisfied, in terms of ss 7 and 8, that relevance and probative value are outweighed by unfair prejudicial effect.

Result

[39] Mr Jones is therefore granted leave to appeal, and his appeal is allowed. The police evidence of what he is alleged to have said to Detective Constables Fleischanderl and Khanna on 17 September with regards to the "washing" incident, is excluded at his trial.

[40] To protect Mr Jones' right to a fair trial, we make an order prohibiting publication of this judgment and any part of the proceeding (including the result) in news media or on the internet or other publicly-available database until final disposition of his trial. Publication in a law report or law digest is permitted.

Solicitors:
Public Defence Service, Auckland for Appellant
Crown Law Office, Wellington for Respondent