

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.

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA260/2016
[2016] NZCA 586**

BETWEEN MALCOLM ROBERT LE GROS
Applicant
AND THE QUEEN
Respondent

Hearing: 29 November 2016
Court: Wild, French and Simon France JJ
Counsel: CWJ Stevenson for Applicant
P D Marshall for Respondent
Judgment: 7 December 2016 at 11.30 am

JUDGMENT OF THE COURT

- A The application for leave to appeal is granted.**
- B The appeal is dismissed.**
- 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 Simon France J)

Introduction

[1] Mr Le Gros faces charges relating to drugs, firearms and property. He seeks leave to appeal, pursuant to s 217 of the Criminal Procedure Act 2011, the decision of Judge Hobbs ruling admissible at his trial evidence located during the execution at his house of a search warrant issued pursuant to s 6 of the Search and Surveillance Act 2012.¹

[2] The search was undertaken to locate property stolen in a burglary two months earlier. A second warrantless search was undertaken, purportedly under ss 20 and 21 of the Search and Surveillance Act, consequent upon the discovery of items in the first search. The Judge ruled the warrantless search unlawful and held exclusion of the evidence improperly obtained as a result of this search was a proportionate response. That ruling is not disputed in this appeal.

[3] Mr Le Gros' challenge to the first search concerns whether there was a proper basis to issue a warrant. It is submitted that there did not exist reasonable grounds to believe the stolen property would be found at Mr Le Gros' house.

Facts

[4] On 5 July 2015 a significant number of items were stolen from the victim's (V's) house. Police came to suspect that Mr Le Gros was the offender and sought a search warrant.

[5] The first aspect relied upon in the warrant application was a visit by a man and woman to V's house three weeks prior to the burglary. V, and a friend who was present, both describe the man in a way that matches Mr Le Gros — European male, shaved head, with tattoos on either side of his neck and on his upper back. The description of

¹ *Police v Le Gros* [2016] NZDC 7894.

his female companion matches the description of a woman known to be Mr Le Gros' partner.

[6] V had advertised items for sale. The person said to be Mr Le Gros arranged to visit and bought several items. He also expressed an interest in a large number of other items that were not for sale. All of the items in which Mr Le Gros expressed an interest were stolen three weeks later in the burglary, together with a television.

[7] V's house is one of a number on the property. On the day of the burglary a person doing cleaning work elsewhere on the property arrived for work at about 8.30 am. This witness noticed a single-cab, high-sided, silver truck parked at the entrance to the property. A man (not Mr Le Gros) was walking back down the driveway towards the truck. The witness told him it was private property. The man then left.

[8] The witness left the property at 10.00 am. The truck was still there at the entrance, but by then there was also a minivan parked next to it. Standing near the vehicles were two people (neither of whom was the man seen on the driveway earlier). The first of the two new people was a European man with a shaved head wearing a long sleeve top and jeans. The second was a younger olive- or dark-skinned woman wearing a beanie with ear flaps.

[9] The same witness came back to the property about 11.15 am. When nearing the property he came upon the couple he had observed standing by the vehicles. They were walking along the road. The man was carrying a jerrycan. The witness gave the two people a ride back to the truck, which was still parked at the entrance to the property. However, the minivan had gone. When the witness left the property for the final time at 1.15 pm, the truck had also gone. The robbery was discovered by V that afternoon around 3 pm when he returned home.

[10] The descriptions given by the witness of these two people generally mirror the descriptions given by V and his friend of their visitors three weeks earlier. Further, the description of the man given by all these witnesses tallies with the description of Mr Le Gros that is recorded in the police computer system.

[11] The witness, who it must be recalled had seen the couple twice that day and had given them a lift in his car, was shown a photo montage of eight people, one of whom was Mr Le Gros. The witness identified three photos as possibilities, but indicated his first choice was Mr Le Gros.

[12] Other information relied upon in the search warrant application included:

- (a) Mr Le Gros was the registered owner of two vehicles similar to those seen outside the property — a white Mitsubishi truck and a white Nissan van;
- (b) Mr Le Gros is a second-hand dealer who stores property at his house;
- (c) Mr Le Gros was facing active charges for receiving and burglary; and
- (d) in relation to the burglary charge he already faced, CCTV footage showed the offender to be wearing the same type of beanie as the woman was wearing outside the property on the day of the present burglary.

Decision

[13] Mr Stevenson accepted that the sufficiency of this evidence was a matter of evaluation but submitted it was an evaluation over which reasonable minds could differ. He invited the Court to reach a different assessment of the merits of the evidence in terms of whether it established reasonable grounds to believe the stolen property would be found at Mr Le Gros' house. He noted that the photo montage evidence was indecisive, and the witness from the day of the burglary had made no reference to the distinctive tattoos Mr Le Gros has on either side of his neck. This could be contrasted with the two witnesses from the visit three weeks earlier who had both noted the tattoos.

[14] In our view this was an accurate application for a search warrant which set out an ample basis on which a warrant might issue. It is a reasonable inference that the people the witness saw on the day of the burglary were the offenders. The timing

points strongly in that direction. The witness selected Mr Le Gros from the photo montage as the person he saw outside the property. The descriptions he had previously given of the couple match Mr Le Gros and his partner. It would be the first of a considerable number of coincidences that the offenders happen to have the same general profile as Mr Le Gros and his partner (European man, shaved head; younger Māori woman). The fact that Mr Le Gros then owns vehicles similar to the two vehicles parked outside the property makes the idea of an unfortunate coincidence more remote.

[15] We attach little significance to the fact the witness did not describe the tattoos. They may have been covered, and his opportunity to observe them was considerably less than V and his friend who spent some time showing the visitors various items for sale. Likewise, we consider the fact that the witness did not categorically select Mr Le Gros' photo does not rob that evidence of probative value. It nevertheless remains the case that his was the photo identified as the most probable. It is a fact legitimately added to the mix when assessing whether reasonable grounds exist.

[16] The coincidence that the items of interest to the visitors three weeks earlier were the items stolen in the burglary strengthens the inference that the visit and the burglary are linked. It then becomes significant that two people who hosted the visit give descriptions of the visitors that match both in profile and appearance Mr Le Gros and his partner. Finally, it is known that Mr Le Gros is a second-hand dealer of goods and was facing active relevant charges of receiving and burglary. In our view, far from being marginal, it was a compelling case for a warrant.

[17] We note that the warrant was sought two months after the burglary. However, given the quantity of material taken, we consider a reasonable belief that some of the property remained at Mr Le Gros' residence was well open.

[18] The appeal, while it concerns the admissibility of evidence that is important to the trial, lacks merit. Accordingly we grant leave to appeal but dismiss the appeal.

[19] To protect Mr Le Gros' 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 the trial. Publication in a law report or law digest is permitted.

Solicitors:
Crown Law Office, Wellington for Respondent