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

CA583/2016
[2017] NZCA 140

BETWEEN	GRANT GENE JOSEPH NICOL Appellant
AND	THE QUEEN Respondent

Hearing:	13 February 2017
Court:	Miller, Mallon and Peters JJ
Counsel:	A Shaw for Appellant P D Marshall for Respondent
Judgment:	27 April 2017 at 3.00 pm

JUDGMENT OF THE COURT

A Leave to appeal is granted.

B The appeal is dismissed.

C 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 Miller J)

[1] Mr Nicol faces trial in the District Court on various charges, including 16 charges of offering to supply or supplying methamphetamine alleged to have been committed in April 2015.

[2] Mr Nicol seeks leave from this Court to appeal against a pre-trial ruling of Judge Davidson in the District Court at Wellington.[1] The effect of the Judge's ruling is that text messages on which the police seek to rely in respect of 14 of those 16 charges are admissible against Mr Nicol ("text message evidence").

[3] If successful, the appeal would dispose of those charges against Mr Nicol. There is no objection to leave and we grant it accordingly.

Issues

[4] The issues which arise on appeal are:

(a) whether the text message evidence was obtained "in consequence" of an unlawful and unreasonable search and therefore was improperly obtained within the meaning of s 30 of the Evidence Act 2006 ("the Act"); and

(b) if so, whether exclusion of the text message evidence would be proportionate to the impropriety.

Background

[5] On 24 April 2015 Constables Hone, Bellhouse and Fleck went to Mr Nicol's address in Porirua. Their purpose was to execute a warrant for the arrest of Mr Nicol's son, Ethan, who had failed to appear in court and might be at the address. As it turned out, they found and arrested Ethan Nicol in a caravan at the rear of the property and Constable Bellhouse took him to a police car.

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1 *R v Nicol* [2016] NZDC 20905.

[6] Whilst at the property, and for reasons we need not discuss, Constables Hone and Fleck commenced a warrantless, and what the Judge later determined was an unlawful and unreasonable, search of the house at the address.

[7] Having commenced the search, the constables called for assistance. Several other police officers arrived, including a Constable Jimmieson who was put in charge of exhibits. In the hour and a half he was present, Constable Jimmieson seized cannabis in a variety of presentations, scales, snaplock bags, empty point bags, two pipes which the constable believed were used to smoke cannabis, a bong, a safe, two cellphones, a diary, keys and bicycles.

[8] Another officer, Detective Kearney, arrived. The Detective's evidence was that the Mr Nichol arrived whilst the search of the house was proceeding. Detective Kearney spoke to Mr Nicol on the grass berm outside the address. Mr Nicol said he did not know anything about any stolen property or drugs at the address and declined to answer any questions. Mr Nicol then left the address, asking that the police leave the back door open when they were finished.

[9] Having completed his task, Constable Jimmieson took the items he had seized back to the police station, leaving his business card behind.

[10] Mr Nicol telephoned Constable Jimmieson later that day on what is referred to as "the 376 number". He asked about the safe that had been seized, saying that it contained cash inherited from a family member. He declined to give the constable the combination to the safe.

[11] Constable Jimmieson then asked a Detective Nalder to telephone Mr Nicol. Detective Nalder knew Mr Nicol from their school days. The Detective telephoned Mr Nicol on the 376 number and asked for the combination to the safe, saying that the police would open it regardless but that a forced entry might damage the contents. Mr Nicol gave Detective Nalder the combination and repeated his explanation for the cash.

[12] Constable Jimmieson opened the safe on 1 May 2015, finding $27,980 in cash, various items of jewellery and four bars of melted down silver.

[13] Constable Jimmieson and Mr Nicol were in contact on the 376 number between 24 April 2015 and 3 June 2015. The purpose of these communications was to arrange for the return of many of the seized items. Constable Jimmieson and Mr Nicol met for this purpose on 22 and 25 May 2015.

[14] On 2 June 2015, Constable Jimmieson sought and obtained a production order pursuant to s 71 Search and Surveillance Act 2012 ("SSA") requiring Vodafone to produce text messages on two cellphone numbers, one of which was the 376 number. It is the text messages produced for that number which are in dispute.

Judge's decision

[15] The Judge found that the search of the house was unlawful and unreasonable, and that the evidence obtained during that search, including the later discovered contents of the safe, was improperly obtained within the meaning of s 30(2)(a) of the Act, to which we refer below.[2]

[16] The Judge then carried out the balancing exercise required by s 30(2)(b) of the Act. The Judge excluded the evidence obtained in the search of the house and safe. He considered that the search was a "sloppy" intrusion into a private home, noting also that none of the charges against Mr Nicol arose from the items seized.[3]

[17] However, the Judge did not accept the submissions of Mr Shaw, counsel for Mr Nicol, to the effect that the text message evidence had also been improperly obtained.

[18] Mr Shaw submitted to the Judge that the text message evidence was improperly obtained for two reasons. The first was that the police had relied on the circumstances of the search of the house in their application for the production order and the second was that the police had only obtained the 376 number because of the

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2 At [37]–[40].
3 At [41].

search. The argument was, and is, that the search led to the business card being left, which led to the telephone call to Constable Jimmieson, which led to the production order.

[19] As to the first of these submissions, the Judge reviewed the unredacted application for the production order and considered that the circumstances of the search of the house played a "fairly minor part" and that the order would have been granted regardless.[4] We too have reviewed the application and agree with the Judge.

[20] As to the second, concerning the circumstances in which the police obtained the 376 number, the Judge accepted that Mr Nicol's original contact with Constable Jimmieson on the 376 number arose from the Constable leaving his business card but said that "leaving the card in itself [was] not unlawful".[5] The Judge also took into account that the production order was obtained at least six weeks after contact had been established between the police and Mr Nicol on the 376 number. The Judge referred to a statement in this Court's decision in *R v D (CA287/2010)* to the effect that a lapse of time between an unlawful search and the obtaining of evidence may have the effect of breaking "the chain of causation".[6]

[21] For these reasons the Judge concluded that the text message evidence was not improperly obtained and was therefore admissible.

Submissions on appeal

[22] Before us, Mr Shaw submitted that the Judge was wrong to say that Constable Jimmieson's act of leaving the business card was not unlawful and was wrong to find that the lapse of time was relevant.

[23] Mr Shaw submitted that Constable Jimmieson's leaving of his business card was part of a trespass and so was an unlawful act on the constable's part. He also submitted that, but for the police actions in seizing items from the house, Mr Nicol

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4 At [46].
5 At [51].
6 *R v D (CA287/2010)* [2011] NZCA 69 at [51].

would not have telephoned Constable Jimmieson and the police would not have obtained the 376 number.

[24] Crown counsel supports the Judge's decision that leaving the business card was not unlawful. Crown counsel also submits that there is at most a remote connection between the search/leaving of the card and the text message evidence because it was Mr Nicol who elected to telephone Constable Jimmieson on the 376 number, and to continue to communicate with him on that same number.

Whether text message evidence improperly obtained

[25] Evidence is improperly obtained if it is obtained "in consequence" of a breach of any enactment of the type specified in s 30(5)(a) of the Act, in this case the unreasonable search of the house. There is a difference of view among the coram about the standard to be applied. Miller and Mallon JJ consider that a real and substantial connection is required between the breach and the evidence obtained.[7] Peters J considers that the authorities require only that there be "a causative link" between the breach and the evidence.[8]

[26] We are agreed that nothing turns on the leaving of the business card per se. The police should not have been in the house but, given that they were and that they were seizing items, it was incumbent on them to advise the occupants how communication might be established. Nor does anything turn, on the facts of this case, on the delay between the breach and the production order.

[27] We are also agreed that the unlawful search of the house and seizure of property, including the safe, led to the police obtaining the 376 number. It was because the police had his property that Mr Nicol telephoned Constable Jimmieson. Mr Nicol's telephone call gave the police the 376 number, without which they could not have sought a production order for it.

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7 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [79]; and *Elia v R* [2012] NZCA 243, (2012) 29 FRNZ 27 at [35].

8 *Lin v R* [2014] NZCA 47 at [17]; *Boskell v R* [2014] NZCA 497 at [9]; *R v Chetty* [2016] NZSC 68 at [47]; and *Ward v R* [2016] NZCA 580 at [47].

[28] Miller and Mallon JJ also accept the Crown submission that it is relevant that Mr Nicol telephoned Constable Jimmieson on the 376 number, when there must have been alternatives open to him. He might have used a landline or another cellphone or visited the police station. It is also correct that, after the initial call, Mr Nicol and Constable Jimmieson continued to communicate using the 376 number.

[29] We have considered whether Detective Kearney's evidence is relevant, given that it establishes that Mr Nicol left the address whilst the search was underway, when he could have remained to discuss the matter with the police there and then. However, the Judge did not refer to this matter, we did not hear submissions on it and it may be that the same outcome would have eventuated, that is contact from the 376 number to seek the return of the seized items.

[30] Causation is ultimately a question of judgment. There is a difference of opinion among the coram. Miller and Peters JJ conclude that the causal connection between the breach, which was serious, and the evidence is sufficiently immediate to establish causation on the balance of probabilities.[9] Mallon J considers the causative link between the illegal search and the evidence obtained under the production order on the 376 number is too attenuated for that evidence to be "in consequence of" the illegal search. That is because the substantive grounds for the production order arose independently of the illegal search and Mr Nicol effectively volunteered the 376 number by using that number to contact the police. In accordance with the view of the majority, the Court concludes that the text message evidence was improperly obtained.

Balancing process

[31] We turn to determine whether or not exclusion of the evidence would be proportionate to the impropriety, and in doing so have regard to those matters in s 30(3) of the Act which are relevant in this case.[10]

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9 Evidence Act 2006, s 30(2).
10 Section 30(2)(b).

[32] We accept Mr Shaw's submission that the impropriety arising from the search of the house and the seizure of many items is substantial and serious. However, the orders that the Judge made go a long way to addressing that impropriety.

[33] The seriousness of the breach is also attenuated because the breach did not supply the substantive grounds for the production order. It merely resulted in the police identifying the 376 number with Mr Nicol. And as noted, he need not have used that phone to contact the police.

[34] The text message evidence is probative of moderately serious offending, and we accept the Crown's submission that it is essential to the Crown case.[11] Although the police have not identified the weights said to have been offered or supplied in every instance, the Crown alleges (and we note this is disputed) that Mr Nicol used the 376 number to offer to supply at least 21 grams over a period of 10 days. The Court would be likely to adopt a starting point of at least three years' imprisonment if these charges and quantities are proved.[12]

[35] In the result, we are agreed that exclusion would be disproportionate.

Result

[36] We grant leave to appeal. The appeal is dismissed.

[37] For fair trial reasons, 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

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11 *Underwood v R* [2016] NZCA 312, (2016) 28 CRNZ 52 at [31].
12 *R v Fatu* [2006] 2 NZLR 72 (CA) at [34].