IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE TIHI-Ō-MARU ROHE

CRI-2017-476-000013
[2018] NZHC 407

RICHARD ARTHUR JAMES CRAWFORD

v

NEW ZEALAND POLICE

Hearing: 23 February 2018

Appearances: T Jackson for Appellant
A R McRae for Respondent

Judgment: 14 March 2018

JUDGMENT OF NICHOLAS DAVIDSON J

Introduction

[1] This appeal is concerned with the admissibility of evidence obtained by the Police by a simple but effective investigatory "trick". It led to the appellant confessing that he had anonymously ordered a Domino's pizza order without paying, sent to an unwitting and unwilling recipient, who had already been upset by fictitious and anonymous orders directed to her address.[1]

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1 *Police v Crawford* [2017] NZDC 25817.

[2] The "trick" involved use of a "telecommunications device" to send an email text from the Police computer to the appellant's cell phone which induced his reply, giving his address. The email text probably constituted an offence in itself, the same offence on which the appellant was convicted in the District Court, as it involved a fictitious representation.

[3] In the District Court, and now on appeal, the issue is whether the confession the Police elicited from Mr Crawford was admissible, given the investigatory trick.

Background

[4] Mr Crawford used a mobile phone to telephone Domino's Pizza and ordered two pizzas and a garlic bread, giving the complainant's address for delivery. The complainant has been the victim of a number of such 'prank orders', including a more serious occasion when a taxi was ordered, on instructions to take her to the hospital. There is no proof the appellant was responsible for those other incidents. On the present occasion, the complainant decided enough was enough and involved the Police.

[5] When she declined the pizza order at her door, she was given the mobile phone number from which the order was made. She tried calling the number without success in identifying the person whose phone it was. She made a complaint to the Police, providing them with the number. The sergeant tried calling the number several times to no avail. He ran the number through Police systems, but could not identify who it belonged to as the phone number was not known to Police systems. Then he sent the following text:

> Thanks for your continued support. You are the winner of two Movie Max 5 session passes to be used by 12/6/17. Text your name and address for the passes to be posted to you.

[6] The appellant immediately replied with his name and address. One evening in the next few days the sergeant drove past the address and noticed there were lights on. He knocked on the door and spoke to the appellant and his father. He said he was enquiring about a fictitious pizza order, and cautioned him. The appellant denied any knowledge of such an order. Then the sergeant said he was "the Movie Max guy"

whereupon the appellant slapped his head, said "I'm so dumb", accompanied the sergeant to the station, and made a full confession.

District Court

[7] The sole issue at trial was the admissibility of the confession under s 30 Evidence Act 2006, on which the prosecution stands or falls. That section provides:

> **Improperly obtained evidence**
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> …
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> (2) The Judge must—
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> (a) find, on the balance of probabilities, whether or not the evidence was improperly obtained; and
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> (b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system of justice.
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> (3) For the purposes of subsection (2), the court may, among any other matters, have regard to the following:
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> (a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:
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> (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:
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> (c) the nature and quality of the improperly obtained evidence:
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> (d) the seriousness of the offence with which the defendant is charged:
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> (e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:
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> (f) whether there are alternative remedies to exclusion of the evidence that can adequately provide redress to the defendant:
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> (g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others:
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> (h) whether there was any urgency in obtaining the improperly obtained evidence.
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> (4) The Judge must exclude any improperly obtained evidence if, in accordance with subsection (2), the Judge determines that its exclusion is proportionate to the impropriety.
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> (5) For the purposes of this section, evidence is *improperly obtained* if it is obtained—

(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.

[8] The Judge had no difficulty finding the confession was improperly obtained and said that "on the sergeant's own evidence he has confessed to using a telecommunications device knowingly giving a false message." Without purporting to determine the matter, Her Honour observed that "it must therefore follow that the obtaining of identification evidence was by way of a police officer committing, on the face of it, an offence".[2]

[9] The Judge then addressed the balancing test under s 30(2)(b) and the factors in 30(3). I cite from the oral judgment:

> [10] The question then becomes whether under s 30 it should be permitted nevertheless or should be excluded, and the tension in respect of s 30 by those who write in jurisprudence may well be summed up by Scott Optician as recorded in Cross on Evidence paragraph 30.4A.
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> [11] Mr Optican concluded that the section:
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> > …exhibits a basic inconsistency regarding the jurisprudential basis for a Court's decision to exclude. On the one hand the language of s 30 suggests that upholding the fundamental protections of the Bill of Rights, maintaining the integrity of the criminal justice system, promoting lawful police behaviour and deterring police misconduct are valuable purposes of the exclusionary rule. Yet the provision also indicates that at some undefined point and for reasons that may change from case to case, conviction of the guilty using evidence garnered by police in breach of the Bill of Rights will support an effective and credible system of justice. The juxtaposition in s 30 of both a rights-based and results-based approach to admissibility creates a confused and divided foundation for the New Zealand exclusionary rule. Similarly the proportionality balancing test incorporates a cost benefit methodology creating an illusion of technical precision that does not

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2 At [8].

> really exist. Indeed despite the impressive sounding language of s 30 and its lengthy list of factors for judicial review it is nearly impossible to analyse objectively the costs and benefits of the exclusionary rule because the process involves measuring imponderables and comparing incommensurables. As a result s 30 may simply permit the personal predilections of judges to masquerade as principal and sanction little more than a judicial gut check in respect of the decision to exclude.
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> [12] I really could not put it better. But it comes down to this balancing act. Accepting that the evidence was improperly obtained, my task is now to set the impropriety beside what was obtained, assessing the various subs (3) factors and any other relevant factor, to determine whether it is in the interests of justice to admit the evidence or to exclude it on the basis of proportionality.
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> [13] There can be absolutely no doubt that the defendant made an entirely voluntary confession. Indeed, slapping his own head and saying, "I'm so dumb", was entirely voluntary. But, when all is said and done, anybody could have written "Richard Crawford, 34 Regent Street" in respect to the unlawful message sent by the sergeant. So in weighing up the value of the confession I must take into account that it was entirely voluntarily given. The sergeant had exposed his falsehood before Mr Crawford slapped his head and said the words, "I'm so dumb".

[10] The Judge placed weight on Mr Crawford slapping his head and saying "I'm so dumb" as an entirely voluntary confession, and that it was made after he had been cautioned and the sergeant's trick had been exposed. Her Honour considered that there were techniques other than the trick available, that there was no urgency, and that the offence was not serious. I have reservations about that assessment of seriousness as there is something sinister about this conduct, anonymously targeting a woman for reasons only to be guessed at. It is more than a prank.

[11] The Judge considered the matter "comes down to the extent to which there is a direct link between the confession and the sergeant's unlawful actions". The revelation by the sergeant that he sent the text saying the appellant had won two Movie Max passes meant that "the only issue is what can only be a relatively tenuous link between realising the "game was up" and the decision to make an entirely voluntary statement".

[12] Ultimately the Judge concluded that "by a narrow margin" she was not satisfied that the confession was "so closely linked to the sergeant's unlawful behaviour" that it should be excluded. On that basis, the charge was proved, and the appellant convicted.

Jurisdiction and approach to appeal

[13] Mr Crawford appeals as of right.[3] As an appeal against conviction, the Court must allow the appeal if it finds that the Judge erred in assessing the evidence to such an extent that a miscarriage of justice has occurred, or that a miscarriage of justice has occurred for any other reason.[4] Miscarriage of justice is defined in the Criminal Procedure Act 2011 as any error, irregularity, or occurrence in or in relation to the trial that has created a real risk that the outcome of the trial was affected, or has resulted in an unfair trial.[5]

[14] The appeal proceeds by way of rehearing, and this Court on appeal must examine the Judge's reasoning and come to its own decision on the facts.[6]

Submissions on appeal

[15] Mr Jackson for the appellant submits the Judge's analysis under the balancing test was wrong as unduly narrow, and overlooked that the Police message was unlawful and improper. It generated the appellant's address and gave the Police crucial evidence that may not otherwise have been obtained. He says the Judge focused unduly on the level of deception or falsehood, and not enough on the fact that the Police, in getting the confession, committed the very offence for which Mr Crawford was being investigated.

[16] For the purposes of s 30(3), he says the impropriety was calculated, and the appellant was "ambushed", taken by surprise, in his own home. The offence he was charged with was minor. There were other investigatory techniques available, there was no urgency, and the impropriety, "the trick", was not necessary to avoid any loss of evidence, or danger to others. He says case law has stated the need to avoid a harsh exclusionary rule in serious cases with significant public interest factors, but where the offence is minor, as he submits is here the case, the converse should apply.

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3 Criminal Procedure Act 2011, s 229.
4 Criminal Procedure Act, s 232(2).
5 Section 232(4).
6 *R v Slavich* [2009] NZCA 188.

[17] Ms Skelton for the respondent says the Judge correctly assessed the evidence in accordance within the s 30(3) factors, and the conclusion reached was available.

Analysis

[18] The evidence of the appellant's identity was obtained as the result of a breach of an enactment or rule of law by the Police, and thus improperly obtained. The Judge correctly reached this view.

[19] The question is whether "the exclusion of the evidence is proportionate to the impropriety", giving "appropriate weight to the impropriety" and taking "proper account of the need for an effective and credible system of justice". On the facts, is exclusion of the evidence of the confession proportionate to the impropriety in obtaining it?

[20] There is no single approach to the s 30 balancing exercise, which is contextual. In *Hamed v R*, Elias CJ said:[7]

> … the general rule is one of exclusion once impropriety is found if the Judge determines such exclusion is "proportionate to the impropriety". The judge has no discretion to decline to exclude the evidence once the threshold of proportionality is reached. And proportionality of exclusion is contextually assessed against the particular impropriety…
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> …the "balancing" required ensures that the reasoning of the court is transparent. What is called for is conscientious disclosure of the full reasons for decision. The section recognises that contextual assessment of proportionality is multi-faceted and entails consideration of factors that may be difficult to compare. A court applying s 30 must explain how the factors relied on bear on a determination that exclusion is proportionate to the impropriety. I do not think this Court should be more prescriptive about how the task is to be carried out in any case than to emphasise the need for explanation, especially in relation to the commonly-recurring (but non-mandatory and non-exhaustive) criteria in s 30(3). I would not encourage the view that courts must go through the formula of referring to each of these criteria in every case.

[21] There is no presumption either for or against exclusion of the improperly obtained evidence, and the s 30(3) list is not exhaustive and not mandatory.[8] While the balancing exercise involves judgment in weighing up competing factors, it is not

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7 *Hamed v R* [2011] NZSC 101, [201] 2 NZLR 305 at [57] and [59].
8 *Hamed v R*, above n 7.

the exercise of a discretion – the evidence *must be* excluded if to do so would be proportionate to the impropriety.[9]

[22] In the context of a campaign of fictitious calls, the effect on the complainant of this fictitious order should not be understated and the Judge properly brought that to account. The seriousness of the offence Mr Crawford was charged with, making a fake $30 pizza order, was not, however, a decisive factor *against* exclusion, and I agree.

[23] In favour of exclusion, I agree there were alternative courses of action available to the Police, as the sergeant admitted when giving evidence. There was no urgency, and there was no danger to anyone, although the complainant understandably wanted no more calls. The Police action required some thought, and the words of the text were carefully considered for their desired effect. It was deceptive, simple and effective, and appealed to the gullibility and greed of the appellant.

[24] An important consideration on appeal is the link between the impropriety and Mr Crawford's decision to confess. While the impropriety hastened the confession, and gave an opportunity to the Police to get it, that was held to be a step removed from the evidence itself. As such the confession was not tainted by any unreliability or undue pressure on the part of the Police, as is sometimes the case involving the admissibility of confessions. The Judge said that the case "comes down to the extent to which there is a direct link between the confession and the sergeant's unlawful actions".

[25] I agree with the Judge that the strength of the link between the impropriety and the evidence obtained is properly a question going to whether the evidence was improperly obtained, and it is relevant to the balancing exercise in terms of the nature of the breach and the interference with rights. If the link is so tenuous that it cannot be said that the evidence was obtained *in consequence* of the breach then the test fails at the first stage and there is no need to go on to the balancing exercise. However, if there

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9 *Hodgkinson v R* [2010] NZCA 457 at [47].

is a link – "if the evidence would not have been obtained but for the breach"[10] – then the balancing test is engaged.

[26] The crucial part of the Judge's reasoning is as follows:

> [16] It will be obvious I have little appetite to reward obtaining evidence by committing an offence, but in the particular circumstances of this case, and by a narrow margin, I am not satisfied that the confessional statement, or even the admission by slapping his head and saying, "I'm so dumb," was so closely linked to the sergeant's unlawful behaviour given that the sergeant indicated the right to silence, his own identity as the author of the unlawful text, before the defendant elected to make a statement. The statement is crucial to the prosecution In those circumstances, by a very narrow margin, I will admit the statement.

[27] I have come to a contrary view about the conclusion that the evidence was admissible because there was only a "tenuous link between realising the "game was up" and the decision to make an entirely voluntary statement".

[28] The trick enabled the sergeant to locate the appellant, who denied his involvement, but when the sergeant owned up to the 'trick' he responded spontaneously – "I'm so dumb". He realised the game was up, and he was better off to cooperate with the Police. That may have been the outcome had the Police located him by lawful methods, but that cannot be assumed.

[29] There is thus a direct link between the trick and the appellant realising the game was up. The fictional message from the Police fooled the appellant. When he said "I'm so dumb" he in effect admitted his conduct and his confession followed. The trick, being the improper conduct, was his undoing. He had until then denied his involvement until he realised he had been tricked.

[30] In the balancing exercise, whether evidence obtained by deception or 'trickery' on the part of the Police is admissible is an issue that has come up in many contexts. Of the highest profile are what have come to be known as 'Mr Big' operations, where Police go undercover and pose as members of a criminal gang.[11] They attempt to

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10 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207.

11 See for example *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753; *Lyttle v R* [2017] NZCA 245.

'recruit' the suspect to the gang, and in the process of recruitment extract a confession from the suspect of crimes they have previously committed. The technique appears to have been used in New Zealand almost exclusively in relation to homicide investigations.

[31] A related class of cases are those which involve alleged entrapment – that is, where undercover police entice or lure the defendant into committing an offence.[12] In those cases, the question is "whether the police conduct preceding the commission of the offence is no more that might have been expected from others in the circumstances".[13] So for example an undercover Police officer approaching a drug dealer purporting to purchase drugs in a way and manner in which an ordinary client of the drug dealer might do so, might not constitute entrapment.

[32] Another class of cases is where the Police use their position to conduct searches without a warrant.[14] They may conduct searches with the appearance of having authority they do not in fact have.

[33] Such conduct is capable in principle of constituting the evidence gathered as a result "improperly obtained". If there is no actual breach of a law or of the New Zealand Bill of Rights Act 1990 the issue will be whether the evidence was obtained "unfairly". When it comes to the s 30 balancing test, a feature of the cases in the categories mentioned is that the seriousness of the criminal conduct under investigation and the necessity of the deception or 'trickery' is such that the impropriety on the part of the Police pales in significance. In order to investigate a suspected murderer they may purport to be criminals who the suspect can trust; in order to obtain crucial evidence they may purport to be executing a search warrant which has not yet been processed and by order approved.

[34] Here the pizza order, ostensibly genuine, was fictitious, as was the Police representation by text while investigating it. The impropriety does not therefore fade into relative insignificance, and excluding the evidence of the confession is,

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12 See for example *Stevenson v R* [2012] NZCA 189.
13 *R v Karalus* (2005) 21 CRNZ 728.
14 See for example *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.

I conclude, a proportionate response. I understand the Police actions, and there is a sinister element to the appellant's action. There is also inherent attraction in the narrative of someone like Mr Crawford 'getting a taste of his own medicine' and being undone by his own gullibility and greed. While this is offending of a low order in the broad scheme of criminal offending, as a matter of principle, a credible and effective system of justice cannot allow the Police in their investigation of a criminal offence to engage in that or other unlawful behaviour, except where that is a necessary part of their work, for example, undercover. More is at stake here, being the way the Police lawfully conduct their investigations.

Conclusion

[35] Exclusion of the evidence is a proportionate response to the impropriety. The appeal is allowed and the conviction set aside. I condemn Mr Crawford's behaviour and do not minimise the distress of the complainant in being subject to a campaign of entirely inappropriate fictitious messaging, including that by Mr Crawford, and anyone else responsible for such targeting of the complainant. Such behaviour must be treated seriously by the Police, and by the Courts. The Police officer's conduct was well intentioned but he needed to reflect on whether the line which marks impropriety would be crossed, and whether on balance it had to be, to identify the suspect and then to speak with him.

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Nicholas Davidson J

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