IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

CRI 2011-042-000884
CRI 2011-042-000869
CRI 2011-042-001092
CRI 2011-042-000890
CRI 2011-042-000904
CRI 2011-042-000882
CRI 2011-042-003516
CRI 2011-042-000903
CRI 2011-042-000874
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CRI 2011-042-000888
CRI 2011-042-000899
CRI 2011-042-000907
CRI 2011-042-000877
CRI 2011-042-000871
CRI 2011-042-000881
CRI 2011-042-001549
CRI 2011-042-000879
CRI 2011-042-000878
CRI 2011-042-000900
CRI 2012-042-000684
[2012] NZHC 2686

THE QUEEN

v

TAYLOR IVAN ANTONIEVIC
THOMAS JOSEPH BASHFORD
NATALIE JEAN BUSCH
COLIN CHINNOCK
JORDAN JOHN DALY
JASON PETER GEORGE FRIEND
JASON PAUL GRIFFITHS
GRANT ROY HAYWARD
TERRY JONES
HAYLEY JOANNE KIRKWOOD
MARK JAMES LEE
RUSSELL PHILLIP LLOYD
JOSEPH MARK PAHL
GREGORY JON PAGE

ROGER PAUL PATRICK
GLYN PATRICK RUTLEDGE
CRAIG PETER SMITH
DAMIAN JOHN STACEY
ROBERT JOHN STEWART
GLEN ROSS THOMPSON
TREVOR JOHN MOMO WILSON

Hearing: 10 July 2012

Counsel: J Webber for Crown
H W Riddoch for Daly and Smith
P B H Hall and S W Rollo for Stacey, Lee, Bashford and Patrick
S W Rollo for Pahl and Friend
A N D Garrett for Chinnock
K H Cook for Griffiths and Kirkwood
L Acland (on instructions) for Jones, Lloyd, Page and Rutledge
No appearance for Busch, Hayward, Stewart, Thompson and Wilson

Judgment: 24 October 2012

JUDGMENT OF SIMON FRANCE J

Introduction

[1] This judgment addresses an application to halt the prosecution of twenty-one people charged with a variety of drugs and other offences. The charges stem from a covert investigation of the Red Devils Motorcycle Club in Nelson. Ten of the accused who were most involved with the Club also face charges of participating in an organised criminal group.

[2] It is established law that in exceptional circumstances a court should prevent charges being heard in order to protect the integrity of the wider criminal justice system. The accused in this case submit that the actions of the police during the investigation are so contrary to proper and acceptable practice that they amount to an abuse of process necessitating a stay of proceedings.

Relevant law

[3] The framework for consideration of an application such as this can be found in the judgment of Richardson P in *Moevao v Department of Labour*.[1] There have been more recent discussions in the United Kingdom which explore more fully the conceptual underpinning of the abuse of process doctrine,[2] but in my view *Moevao* defines the role of a New Zealand court in this area:[3]

> It is not the purpose of the criminal law to punish the guilty at all costs. It is not that that end may justify whatever means may have been adopted. There are two related aspects of the public interest which bear on this. The first is that the public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it.
>
> ... The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse. It does so in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes from the conduct of the prosecutor in relation to the prosecution that the Court processes are being employed for ulterior purposes or in such a way (for example, through multiple or successive proceedings) as to cause improper vexation and oppression. The yardstick is not simply fairness to the particular accused. It is not whether the initiation and continuation of the particular process seems in the circumstances to be unfair to him. That may be an important consideration. *But the focus is on the misuse of the Court process by those responsible for law enforcement. It is whether the continuation of the prosecution is inconsistent with the recognised purposes of the administration of criminal justice and so constitutes an abuse of the process of the Court.* (emphasis added)

[4] In *Warren v Attorney-General for Jersey*, the Privy Council noted relevant factors as being:[4]

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1 *Moevao v Department of Labour* [1980] 1 NZLR 464, at 482.

2 *R v Maxwell* [2010] UKSC 48, [2011] 1 WLR 1837; *Warren v Attorney-General for Jersey* [2011] UKPC 10, [2012] 1 AC 22; *R v Grant* [2005] EWCA Crim 1089, [2006] QB 60.

3 At 481–482, per Richardson J.

4 At 32, approving the writings of Professor Andrew Choo in *Abuse of Process and Judicial Stays of Criminal Proceedings* (2nd ed, Oxford University Press, 2008, p 132).

(a) the seriousness of the violation of the defendant's rights;

(b) whether the police acted in bad faith, or maliciously, or with an improper purpose;

(c) whether the misconduct was committed in circumstances of urgency, emergency or necessity;

(d) the availability of other sanctions against the wrong-doer;

(e) the seriousness of the offences with which the defendant is charged.

[5] Against that background I turn to the relevant facts.

Facts

[6] The police believed that the emerging prominence of the Red Devils Motorcycle Club was a forerunner to it becoming a chapter of the Hells Angels. It undertook a covert investigation, obtaining warrants to intercept telephones and text messages, and to install listening devices. The police also infiltrated the Club with two undercover officers posing as a couple.

[7] It seems that there was always a level of suspicion amongst the leaders of the Club about the *bona fides* of the male undercover officer, MW.[5] At one point the police officers supervising MW became concerned that he would be exposed, so began a strategy to strengthen his credibility. Two steps taken in this regard are the focus of the present application.

(a) The first challenged action – a fake search warrant

[8] From early in the investigation a storage lock-up had been rented in MW's name. It was believed (wrongly I understand) that the owner of the storage facility was involved with the Club. As part of the strategy to strengthen MW's credibility,

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5 The initials of his assumed name.

the police placed in the lock-up some apparently stolen equipment, and some equipment consistent with involvement in cannabis offending.

[9] Next, the police prepared a fake search warrant. On its face the warrant appears genuine. It is in the correct form,[6] and the manner of its completion is consistent with a legitimate warrant. It recited that there existed reasonable grounds to believe that certain items would be located in the storage unit, and it authorised search of the unit occupied by MW.

[10] A search warrant can only be issued by a judicial officer. It is, after all, a statement that a judicial officer has considered the evidence available to the police and has independently assessed that evidence as justifying an intrusion into the privacy of others. This fake warrant, unappealingly described to me by the officers involved as "a prop", purported to be signed by a judicial officer. At the bottom of the standard form there is room for the appropriate signature, and under that space are listed:

> District Court Judge
> Justice of the Peace
> (Deputy) Registrar (not being a constable).

[11] The police scrawled an apparent signature, and then deleted the top two options, thereby asserting the warrant has been issued by a Deputy Registrar, name indecipherable.

[12] The purpose of the strategy was to establish MW's criminal credibility, so obviously the execution of the warrant had to be public. Accordingly, the owner of the storage facility was summonsed to attend. He was some distance away but he came and was shown the warrant. On the strength of that, the owner of the facility opened MW's lock-up, and observed what was located.

[13] The police support this conduct by observing it is not a real warrant, and it related to a lock-of up of which they were the lawful occupier, and to goods which were in their control. So other than duping the owner of the facility, no privacy interests were threatened.

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6 Summary Proceedings Act 1957, Form 50.

(b) The second challenged action – false charges

[14] Having carried out the search, the police officers immediately supervising MW contacted their superiors to seek advice as to what to do now. A group met and the decision was made to carry through with the ruse. This meant MW had to be arrested and charged with offending. They were of course false charges.

[15] MW was duly arrested in public, "processed", and placed before the District Court. One information was sworn charging him with possessing equipment capable of being used in the commission of an offence against s 9 of the Misuse of Drugs Act 1975. For those not familiar with informations, they are the charging document which initiate a prosecution. The offender is described and then an information recites:

> I, [x], a constable, say on oath that I have just cause to suspect and do suspect that MW, on 27 May 2010, possessed ...

[16] At the bottom the constable signs it, having duly sworn on oath before a Registrar to the truth of that which has just been recited. Constable X, and his supervisors, knew this to be a false oath. MW had not committed such an offence, and Constable X did not suspect he had.

[17] What was the court's role in this? The Judges before whom MW appeared on several occasions knew nothing of it and believed they were dealing with a genuine case. However, the police had visited the then Chief District Court Judge, Judge Johnson, to inform him of it and believed they had his approval. I will return to that shortly.

[18] To complete the narrative, MW appeared and was remanded. It had been anticipated he would plead guilty reasonably quickly, but the Club members, on learning of his difficulties, had directed him to a defence lawyer they had previously engaged. The defence lawyer, believing MW to be a legitimate defendant, advised against an early plea and so the process became much more protracted than intended. To stay in role the police considered MW had to take the lawyer's advice, and so repeat appearances became required.

[19] MW was not based in Nelson the whole time. On one occasion around the time he was to appear in the Nelson District Court, he was in fact in the North Island. It was decided it would further boost his credibility if he did not appear. A bench warrant was issued. It appears this happened twice, with the warrant on each occasion being cancelled by MW voluntarily appearing at a later date. A further charge of breaching bail was laid. This was at least genuine in that MW had indeed breached bail by not appearing.[7] Soon after the operation was terminated, and police sought to have the charges withdrawn.

(c) The visit to the Chief Judge

[20] Central to the police view of the legitimacy of what occurred was a visit made by Detective Superintendant Drew and Detective Senior Sergeant Olsson to Judge Johnson. It was Detective Superintendant Drew's evidence, which I accept, that he would not have authorised the false charge scenario if he did not think he had judicial approval.

[21] Detective Drew testified before me twice. On the first occasion he said that the visit followed established police protocol for what are called "scenario situations". He referred to a relevant extract from the Undercover Procedures Manual that had been disclosed earlier that day. The process followed was in accord with that.

[22] In its relevant parts the Manual extract provided (not verbatim):

> The arrest of an (undercover) agent will fall into one of the categories in this table:
>
> (a) an unplanned arrest by operational police of undercover officer who is in the course of his duties;
>
> (b) an unplanned arrest by operational police of undercover officer for offences committed outside his duties (**e.g.** drink driving);
>
> (c) the agent is arrested as part of a planned scenario to assist cover or infiltration of a criminal group.

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[7] It can be noted a third information was laid. This was as a consequence of MW being arrested, along with others, during a raid on the Club headquarters. Again the charge was legitimate, although obviously the name MW is not.

Procedures were set out for the first and second categories focussing on what the undercover agent, and his or her controller, must do. The same was presumably not required for the third scenario because it was a planned arrest.

[23] Later, the Manual extract has a heading "Appearing in Court". The opening words are:

> Police must now allow an arrested agent to appear under a fictitious name without the permission of the court. **Deceiving the court is not permitted**.

[24] It then proceeds to set out a procedure for where it is desired that the officer appear in court under a "cover name". The procedure involves preparation of a report for the Chief Judge on behalf of the National Manager of Criminal Investigations. The report would:

(a) outline the request in general;

(b) the relevant charge(s);

(c) the proposed action and resolution of the charge(s);

(d) but would not include details of the undercover officer's false name, true name or which District Court was involved.

Then by separate letter in a sealed envelope the withheld details would be set out. The separate envelope would be provided to the Chief Judge if he or she requested it. There was then set out a protocol for arranging a meeting. The Manual concluded:

> Past experience has shown that the Chief Judge is supportive of requests of this nature, and has not previously required the details of the agent or location to be disclosed.

[25] Detective Superintendant Drew advised that he and Detective Sergeant Olsson visited the Chief Judge. They presented a letter which set out the scenario. The Chief Judge asked only a couple of questions about the targeted group, did not want to see the sealed letter and the meeting ended.

[26] I admit I was surprised, to say the least, that such an established protocol could exist for a process which, at least in my view, uncomfortably blurs the respective roles. However, the evidence was that it did, and that the police followed it.

[27] I was interested at the hearing to learn of the extent of this established practice. Detective Superintendant Drew could only instance one other example of a false charge scenario. It transpires in that case that the approach was not to the Chief Judge but to the local Judge. The brief material I saw about that occasion suggests it is at least open to debate whether the local Judge "approved" the proposal.

[28] The existence of this one previous occasion, which did not involve a Chief Judge, made the terms in which the protocol was written somewhat puzzling. How could an expectation exist about how the Chief Judge would react when seemingly none had ever previously been approached? Following the hearing, the Crown advised that new information about the protocol had come to light. The document to which Detective Superintendant Drew was referring when he gave evidence had not in fact existed in that form at the time Judge Johnson was approached. Rather, it was written afterwards to reflect the police perception of what had been now established as a result of this visit, the first ever, to a Chief Judge.[8]

[29] Detective Superintendant Drew was accordingly required to testify a second time. On this occasion so did Detective Sergeant Olsson, who was the one who had updated the Manual subsequently, and who visited the Chief Judge with Detective Superintendant Drew. The Manual as it existed at the time of the approach to Judge Johnson was produced. There is no reference at all to the scenario situation that appears as the third option in the revised Manual. All it posits is an officer being arrested or charged with an offence. The document states:

> The Police must not allow an arrested agent to appear under a fictitious name without the permission of the court. Deceiving the court is not permitted.

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[8] The new version reflects the dangers that can arise through untested assumptions being then portrayed as practice. There can be no basis for the rewritten protocol to state, based on one visit, that past experience shows the Chief Judge is supportive, and has not previously required the details. It is misleading in suggesting an established practice where none exists.

[30] The inference I take from the document as it then was is that its focus was on the unplanned arrest situation, and whether it would be sought to allow the officer to proceed under his or her fictitious name.

[31] It is necessary as a final step in the description of events to set out the terms of the letter that was provided to the Chief Judge:

> Dear Sir
>
> **Appearance in Court of Undercover Agent**
>
> This letter is a request for approval to allow a Police undercover agent to appear in Court under an assumed name.
>
> The Police have a clear policy that this will not happen without the knowledge and approval of a District Court Judge.
>
> The circumstances of the case are as follows:
>
> The Police are currently undertaking an investigation into the activities of an organised crime group. This investigation includes the deployment of undercover officers.
>
> On Saturday 29 May 2010, one of the undercover agents was arrested during an orchestrated scenario. This arrest was necessary to:
>
> - protect the agent's assumed identity and ensure his continued safety
> - divert suspicion
> - enhance agent's appearance of criminality.
>
> The location, identity of the Police officer and assumed name being used by the agent are available if required.
>
> Police would now like to facilitate the agent appearing in the local District Court under his assumed name.
>
> The charge the agent would be facing would be laid summarily under s12A of the Misuse of Drugs Act 1975.
>
> This is a charge for which the agent, as a member of Police, has a complete defence pursuant to s34A of the Misuse of Drugs Act.
>
> It is proposed that the agent would appear before a District Court Judge next week, be represented by the Duty Solicitor, and obtain a remand without plea.
>
> The agent would then plead guilty to the offence at a later hearing, obtain a conviction under his assumed name and pay any fine imposed or undertake any other sentence as necessary.

Observations on the evidence

[32] I observe at the outset that the Police believed they had obtained a sign-off for what thereafter transpired. There was no bad faith.

[33] I do consider, however, that there is a significant measure of recklessness in holding that belief. The evidence before me was characterised by references to practices and protocols, none of which existed in reality. No Chief Judge had previously been visited about a false charge scenario. Although it is thought it has happened before, the only evidence is that it has happened once. I accept on that occasion a District Court Judge was approached, but have little confidence about what form of approval was obtained, if any. Based on the present case, I also have no confidence about how it was presented to the Judge on that occasion.

[34] I accept without question that Detective Superintendant Drew at no stage intended to mislead the court. But on the first occasion of testifying, there was conviction about his evidence stating that the police were following procedures set out in a document which did not in fact even exist at the relevant time. It reflects my impression that this was a group of well intentioned officers convincing themselves that what was happening was all permissible, but always without reference to any external advice. It may be that the reality of the undercover programme requires, and no doubt engenders, such an in-house approach, but there are dangers. It is accepted that no legal advice about what was being done was sought. It is unwise.

[35] Turning to the meeting with the Chief Judge, I do not accept that the Chief Judge and the Police were on the same page. I consider the letter was wholly inadequate to alert the Chief Judge to the realities of what was involved. It would never satisfy the most rudimentary disclosure obligations for an ex parte situation. Initially its lack of clarity seemed explicable given it was relying on an established protocol. When one realises that protocol is a fiction, the inadequacy of the letter becomes obvious.

[36] It is to be recalled that Judge Johnson would not previously have any experience or exposure to a situation where charges are made and prosecuted as an investigative tool. Like many or most in the system, I am sure he would be aware that occasionally officers are processed under a false name. There is nothing in the letter that would have alerted the Judge to the fact that the present situation was the former and not the latter. Indeed one must ask why would it, given it is essentially an unheard of event.

[37] I consider it is a significant deficit that no legal advice was sought in terms of the initial use of a fake warrant, the plan to lay false charges, the obligations of disclosure to the Judge if he was to be approached, the appropriateness of seeking to do this by meeting with a Judge in his chambers, the correctness of using the court's processes as an investigative aid, and how the false charges/wrong convictions would all be undone at the end.[9]

[38] I admit I was somewhat surprised, and remain so, at the lack of insight by the officers directly involved about the lack of propriety involved making up a warrant purporting to be issued and signed by a judicial officer, and then executing it on a member of the public as if it were real. Finally, I have already observed that the errors that occurred in the way the evidence emerged, whilst in no way deliberate, in my view reflect the same lack of a hard look at the reality of it all, and too ready an assumption that the police perspective was correct.

[39] All this leads me to the view that whilst there was no bad faith, and whilst the police believed they had a judicial imprimatur, that state of mind affords less comfort and excuse than it might sometimes do. This state of mind was as much or more the product of a lack of external advice, and a large measure of assumption flowing from the lack of any proper scrutiny, as it was the product of any reasonable grounds for so thinking.

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[9] I asked the officers if any thought had been given to this, and the answer was "no".

An abuse of process?

[40] I consider first the factors earlier identified, and then attempt to sit back and assess the issue as a whole.

(i) The seriousness of the violation of the defendants' rights

[41] Here the rights of the defendants have not been violated. They may have been duped into thinking MW was legitimate, but it seems suspicion continued. The intercepted communications reveal on-going talk of hiring a private detective to inquire into MW. There is no basis to be concerned in this case about the effect of the police actions on the accused.

[42] The owner of the storage facility has certainly been the victim of improper police conduct. In acting as it did in relation to the warrant, the police called in aid a very necessary reservoir of trust that the public holds in relation to the police and warrants. It is expected by the public that warrants will have been properly issued, and that the police who present the warrants to the public believe that they hold judicial authority to act as they are. These expectations lead the vast majority of citizens to respond appropriately when confronted with a warrant.

[43] The police misused that trust in relation to the storage facility owner. They did so not out of necessity or urgency, or error, but because it suited their investigative purposes. It was, in my view, significant misconduct to present the "warrant" to a member of the public and require him to act on it.

[44] Turning from the storage facility owner to the court itself, the court's processes can truly be said to have been abused, first by the use of the warrant, and second, by the laying of a false charge. One need only unpackage the false charge scenario to appreciate that insufficient thought went into what was being done. The starting point must be that a police constable was knowingly swearing a false oath; that should always give those involved reason to pause and seek advice.

[45] However one looks at it, a fraud is being committed on the courts. The Judges who are dealing with it are being treated in a disrespectful way. Their time is being taken up on a fiction. Bench warrants were issued just so investigative credibility could be further garnered by exacerbating the discourtesy to the court. And then at the end of the process, a Judge would have been expected to sentence. It can also be observed that the prosecutor would have been misled, and so was defence counsel who was induced to act for, and provide advice to, an undercover officer in relation to a fictitious charge.

[46] It is no function of the court to facilitate a police investigation by lending its processes to the false creation of street credibility. The courts are not part of police investigation. There is and can be no suggestion of collaboration. The court is independent, and sworn to treat all who come before it equally and without favour. In my view there can be no doubt that what the police did here is a fundamental and serious abuse of the court's processes.

[47] At one point the proposition was raised for the police as to whether what was done here was that much different from allowing an undercover officer to be processed for a real charge under a false name. There are a number of responses. First, as will be discussed, the Births, Deaths, Marriages, and Relationships Registration Act 1995 sets out specific procedures for the creation of false identities. So to that extent there is some legislative contemplation.

[48] Second, those swearing the information believe in these situations that it is true, and indeed other than the name, it is. An offence has been apparently committed. Third, perhaps the two situations are quite similar. But at least from my viewpoint all that does is call into question the correctness of the false name practice. I am certainly not to be taken as endorsing the processing of undercover officers as defendants under false names when there is apparently no statutory authority to do so.

[49] So in conclusion on this crucial aspect, I consider that what has occurred here amounts to two occasions of serious misuse of the court's processes. Further, it is exacerbated by the failure to take any advice. Finally, the belief of the police officers

involved that they had judicial approval was genuinely held, incorrectly held and not reasonably held.

(ii) Bad faith

[50] I have dealt with his.

(iii) Urgency, emergency, or necessity

[51] None existed. It was thought that the risks to the officer of disclosure were increasing but this is not a situation of urgency. The main threat was not to him since he was in and out of Nelson on a regular basis and could be removed at any time. The threat was to the on-going operation. There was ample time to take advice.

[52] The issue of whether a ruse such as this is necessary does, however, provide opportunity to briefly explore what statutory authority there might be. The first provision to note is s 65 of the Births, Deaths, Marriages, and Relationships Registration Act 1995. It allows the Minister of Police to apply to the Minister in charge of the Act to create new identity information for an undercover police officer. That information will involve birth and relationship status information.

[53] Next, ss 108, 109 and 120 of the Evidence Act 2006 set out the rules for an undercover police officer to testify under an assumed name. Careful conditions are placed on that, and it is limited to situations where the accused faces charges of sufficient seriousness. Also relevant is s 34A of the Misuse of Drugs Act 1975 which provides that an undercover officer may not be prosecuted for an offence against the Misuse of Drugs Act, if it relates to conduct undertaken in the course of duty, unless the prior consent of the Attorney-General is obtained. Its purpose was apparently to offer undercover officers protection from improper private prosecutions.

[54] What one can say about the legislative environment is first, that various situations that might arise in relation to undercover officers have been considered and provided for. This includes authorising a false identity, and allowing them to

testify under the assumed name in certain circumstances. Second, strict conditions and controls always attend such provisions. Third, there is no hint that Parliament contemplated or authorised activities such as the present. Given what is involved, that is not surprising.

[55] I accordingly conclude that it is relevant that this ruse was carried out without statutory authority, and in circumstances where legislative consideration has been given to what is permissible.

(iv) Other direct sanctions

[56] It seems obvious that the conduct component at least of some criminal offences has been committed. The search warrant would seem to engage s 256 of the Crimes Act 1961, and the swearing of a false information would seem to engage s 110 of the Crimes Act 1961. However, I think it reasonable to proceed on the basis that charges will not be laid. Ultimately that is a decision for other authorities, and by raising it I am not suggesting that my view is there should be charges. I consider the issue involves inadequate processes which are wider than the individual officers who were immediately involved.

(v) The seriousness of the charges against the accused

[57] The allegations against the twenty-one accused are plainly serious, but in the context of this exercise must be kept in some perspective. With the exception of Mr Jones, the drug allegations are mainly at the lower end of the scale. Many relate to sharing or selling within the clubhouse amongst each other, or to visitors. There are no charges of violence which involve injury to people, although there is an allegation of a conspiracy to do so.

[58] The allegation of organised criminal group is always serious. I consider it is fair to observe here there are grounds to dispute it. That is not at all to say that it would not be proved at trial; just that from my assessment, it is legitimate to contest it.

[59] Overall, I assess the seriousness as moderate, and not involving directly any victims of violence.

Overall assessment

[60] Mr Webber's submissions on behalf of the Crown referred me to recent decisions in the United Kingdom where apparently more serious conduct was not visited with a stay. He submits that any errors or misconduct that I might identify here would not be of a magnitude that meant the public interest in a proper resolution of these allegations against twenty-one accused was overwhelmed.

[61] I describe some of those cases to give content to the submission. *Grant* involved the deliberate recording of privileged conversations between the accused and his lawyer.[10] Mr Grant was charged with murder. The illegal intercepts yielded no evidence. The Court of Appeal concluded a stay of proceedings would have been appropriate. More recent decisions of the United Kingdom Supreme Court have expressly disagreed with that assessment.

[62] In *Maxwell*,[11] a conviction for murder and robbery were obtained as a result of prosecutorial misconduct. The prosecutors (not counsel appearing in Court) had misled everyone as to the benefits a key witness was receiving. The witness was a serving prisoner who was feted with an extraordinary array of benefits. These included financial benefits over which the Court had been expressly misled.

[63] Twelve years later all this emerged and there was no issue that the convictions should be quashed. This would be so regardless of any abuse of process argument because the witness was pivotal and had lied. The issue was whether there should be a retrial, the complicating fact being that since his initial conviction, Mr Maxwell had made admissions. Accordingly, there was different evidence to support a retrial, if one was not denied because of the abuse of process. By a majority the Supreme Court upheld the Court of Appeal decision to allow a retrial.

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10 *R v Grant* [2005] EWCA Crim 1089, [2006] QB 600.
11 *R v Maxwell* [2010] UKSC 48, [2011] 1 WLR 1837.

The voluntary nature of the admissions, untainted by the prosecutorial impropriety, was seen as significant, as was the charge.

[64] In *Warren v Attorney-General for Jersey*,[12] the authorities sought permission to track a car through foreign territory. It was denied. The Attorney-General for Jersey made it clear that in light of this refusal, tracking should not occur. The police did so anyway, having received legal advice that a court would be unlikely to exclude the illegally obtained evidence. The Supreme Court considered the matter to be finely balanced, but considered on appeal it could not be said the decision not to stay the proceedings was an unreasonable exercise of discretion.

[65] There are no New Zealand cases of which I am aware that are helpfully comparable.

[66] Standing back, I take as my starting point that the acts of misconduct are certainly of a nature to justify a stay of proceedings. The court's processes have been abused in a significant way. The fake search warrant was used in circumstances where it was falsely represented to a member of the public that it had been issued by a judicial officer. The false charges involved the swearing of a false oath, and then further opportunistic abuse of the court's processes. The misuse of the court's processes reflects a significant misunderstanding of the role of the court, and its independence from the police. It is not there to be used as a convenient investigation aid. A firm response is appropriate.

[67] Balanced against that outcome are three things – the police, as regards the false charge activities, thought they had permission; there is no strong causal link between the misconduct and the evidence underlying the charges ultimately laid; the proceedings involve a large number of accused charged with serious offences.

[68] Concerning the absence of bad faith, I have already explained my assessment. I simply note at this stage that I do not consider it was reasonable for the police to hold the views they did. Further, the misuse of the warrant was not done in good faith. There was no suggestion anyone had approved that.

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[12] *Warren v Attorney-General for Jersey* [2011] UKPC 10, [2012] 1 AC 22.

[69] The lack of any strong causal connection is significant. I was not convinced by the efforts of the defendants' counsel to establish a connection. In theory it may be that the club members might have otherwise twigged to MW's real occupation. However, that is very speculative, and the reality is that club members continued to suspect him anyway, notwithstanding the courtroom role play. The most that can be said is that the misconduct may have helped MW to maintain his cover.

[70] In terms of how much significance should be placed on this lack of any real causative connection, it is proper to note that in *Maxwell* the majority judges saw it as important. However, when the rationale for recognising an abuse of process doctrine is considered, it does not appear to me to be in any way decisive. The concern is not unfairness to the accused, but the necessity to maintain the integrity of the court's processes.[13] Although the immediate impact can be the unpalatable step of allowing persons accused of serious offences to avoid a trial, the longer term effect is the restoration of the public confidence in the integrity of the system.

[71] Accordingly, I conclude it is sufficient connection if a charge is the product of the investigation known as Operation Explorer. I understand that description to apply to the charges being faced by all twenty-one listed in the intitulment to this ruling.

[72] As for the decisions of the United Kingdom Supreme Court on which the Crown relies, there are points of difference. *Grant* involved a situation that would usually arise under a s 30 Evidence Act 2006 inquiry into illegally obtained evidence; no evidence was obtained so, as I see it, abuse of process was rather more of a fall back analysis. The present case is more serious and literally involves the court's processes being misused. In *Maxwell* the Court was divided, and one cannot deny the reality that the offence in question was murder. What is involved in these cases is a balancing exercise and the alleged offending in this case involves nothing comparable to the charges in *Maxwell*. In *Warren* the Court would equally have upheld a stay of proceedings had one been imposed, so it does not particularly tell against a stay being entered here.

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[13] In this regard see the discussion of Lord Kerr in *Warren*, above, at [81]–[85].

[73] Finally, it is appropriate to consider whether it is not enough to just articulate the concerns. It is to be expected that the police will as a consequence of this judgment take advice, and where it is thought necessary adjust practice. I doubt a false information about a fictional offence will again be sworn. Is it necessary, therefore, to go further and prevent the hearing of charges against twenty-one accused?

[74] As recognised in *Warren*, different views can be reasonably held. I see the actions of the police in this case as involving serious misuse of the court, and a troubling misunderstanding of its functions. Anything other than a significant response runs the risk of being seen as rhetoric. In the end I consider it comes down to how serious one sees the conduct as being, and what price the system is being asked to pay in order to preserve its integrity. For the reasons I have articulated I view the conduct as plainly engaging the concerns identified in *Moevao*, and as necessitating an actual response. That response can only be a stay of proceedings.

Conclusion

[75] All prosecutions of the twenty-one accused, who are listed in the intitulment, in relation to charges fairly said to flow from the Operation Explorer investigation, are hereby stayed by order of the Court.

Simon France J

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