

CASE NOTE: *R V WILSON* [2015] NZSC 189; *R V KUMAR* [2015] NZSC 124.

DEBRA WILSON*

I. INTRODUCTION

In 2015 the Supreme Court heard three cases involving legal issues relating to undercover police operations. Two will be discussed below; the decision in the third has not been released at the time of writing.

II. *R v WILSON* [2015] NZSC 189

A. The facts

This case involved a police investigation ('Operation Explorer') into the Red Devils Motorcycle Club in 2009, following concerns that the Red Devils were growing in prominence and were intending to become a chapter of the Hells Angels Motorcycle Club. Part of the investigation involved a separate Operation, known as 'Operation Holy', in which two undercover police officers (a male and a female) were used to gather information. When it became apparent that the Red Devils were becoming increasingly suspicious of the male undercover officer, the Police undertook an elaborate scheme in an effort to enhance the officer's credibility. This involved the Police seeking and obtaining a search warrant using fabricated information, and the consequential bringing of charges against the male officer. The officer in fact subsequently appeared in the District Court on several occasions under a fictitious name.

B. The Decisions of the Courts

Operation Explorer resulted in 21 defendants, including Wilson, facing 151 counts under the Crimes Act 1961 and the Arms Act 1983. These defendants subsequently applied for a stay of prosecution on the basis that the undercover operation had undermined the integrity of the judicial system. When the stay application was partially heard, and following a sentencing indication, Wilson decided to plead guilty to 5 counts relating to the possession and supply of drugs. Subsequently, Simon France J ordered a stay for the remaining defendants. Wilson then appealed to the Court of Appeal to vacate his guilty plea. Before this appeal could be heard, the Court of Appeal quashed the order for the stay of the remaining defendants.¹ Wilson abandoned his appeal against conviction but was successful in reducing his sentence from 2½ years' imprisonment to 9 months' Home Detention. He subsequently appealed to the Supreme Court on the basis that the Court of Appeal's decision to quash the stay of the remaining defendants was incorrect.²

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¹ *R v Antonievic* [2013] NZCA 483, [2013] 3 NZLR 806.

² Wilson's aim in bringing this particular appeal was to convince the Supreme Court that the High Court decision granting the stay in relation to the other defendants based on the impact of the undercover operation was the appropriate decision. As he had similarly been affected by the undercover operation,

The Supreme Court considered that there were three elements of Operation Holy which were “troubling”. Firstly, the fabrication and use of a false search warrant was seen as undermining the importance of there being independent scrutiny of a warrant application by a judicial officer to protect against state abuse, and was “a false document for the purpose of s256 Crimes Act”. Secondly, the male undercover officer appeared in court (on several occasions) and swore an oath that both he and his superiors knew to be untrue. This displayed “an unacceptable attitude to documents and processes which are important components of the criminal justice system”. Finally, was the involvement of the Chief District Court Judge. The Supreme Court commented that the “independence of judges from the executive, both in appearance and in reality, is critical to both the proper operation of the rule of law and New Zealand’s constitutional arrangements, and to the maintenance of public confidence in the operation.” It concluded that “it is quite wrong that judges should be asked to play an active part in investigative techniques... such involvement is not consistent with the judicial oath.”

In relation to the discretion to grant a stay, the Supreme Court considered that this discretion might be appropriately exercised if the actions of the police had prejudiced the fairness of the defendant’s trial, or if allowing the trial to proceed would have undermined the public confidence in the integrity of the judicial process. The Court referred to authority in both the United Kingdom³ and in Canada⁴ which supported an integrity-based rationale for granting a stay. This required the application of a balancing exercise⁵ which weighed the importance of prosecuting those charged with grave crimes against the importance of not conveying the impression that a court will consider that the end will justify any means. Relevant, but not determinative, was the existence of a causative connection between the unlawfully obtained evidence and the prosecution or conviction.

In the present case, the Supreme Court considered that a causative connection could be established. The actions of the Police, while not effective in completely eliminating the suspicions of the male undercover officer, nevertheless assisted with allowing the undercover operation to continue. Also relevant in the balancing exercise was the “powerful” consideration of public confidence in the police, the moderately serious nature of the appellant’s offending, the fact that the police actions did not cause the appellant to offend, and the one-off nature of the police’s actions (as opposed to it being part of an established pattern). On balance, the Court agreed with the Court of Appeal that a stay was not appropriate in this case.

he would then reinstate his appeal to have his guilty plea vacated (on the basis of incorrect legal advice) and then argue that the stay should similarly apply to him.

³ *R v Horseferry Road Magistrates Court, ex p Bennett* [1994] 1 AC 42 (HL); *R v Looseley* [2001] UKHL 53, [2001] 1 WLR 2060; *R v Maxwell* [2010] UKSC 48, [2011] 1 WLR 1837; and *Warren v AG of Jersey* [2011] UKPC 10, [2011] 3 WLR 464.

⁴ *R v Mack* [1988] 2 SCR 903.

⁵ *R v Latif* [1996] 1 WLR 104, [1996] UKHL 16. Adopted in *Warren v AG of Jersey*, above n 3.

III. *R v Kumar* [2015] NZSC 124

A. *The Facts*

Kumar was a suspect in a murder investigation, and was arrested following an interview with the police. He subsequently spoke to a lawyer by telephone. On receiving assurance from the Police that Kumar would not be interviewed again that night, the lawyer made arrangements to meet with Kumar the following morning. That evening, two undercover officers were placed in the same cell as Kumar. They struck up a conversation with him which lasted 80 minutes, and during this time asked first general, then more specific, questions in relation to the murder. Kumar subsequently argued that evidence obtained during this conversation was inadmissible.

B. *The Decisions of the Courts*

In the High Court,⁶ Venning J held that this evidence was admissible. Kumar sought leave to appeal this decision directly to the Supreme Court,⁷ but this application was dismissed.⁸ Kumar then appealed to the Court of Appeal,⁹ which allowed the appeal, finding that the evidence was improperly obtained.

In the Supreme Court, the majority decision of William Young, Glazebrook, Arnold and O'Regan JJ dismissed the appeal, agreeing with the Court of Appeal that the accused was deprived of his right to silence through depriving him of his choice whether to speak to police. This was particularly the case following assurances made to Kumar's lawyer that he would not be interviewed again that evening. The majority considered and adopted the "active elicitation" test developed in the Supreme Court of Canada¹⁰ and subsequently applied in New Zealand¹¹ and Australia.¹² Under this test, the accused's right to silence is not automatically breached through the use of undercover police officers to gather information. It will, however, be breached where the information has been actively elicited in situations where the "relevant parts of the conversation were the functional equivalent of an interrogation".

In considering the transcripts of the conversations recorded by both undercover officers, the majority disagreed with the High Court's comment that the same conversations would have occurred between Kumar and a genuine prisoner, considering that this was not a relevant consideration. In the majority's opinion, applying the active elicitation test required a consideration of both the nature of the exchange and the nature of the relationship between the undercover officer and the

⁶ *R v Kumar* [2013] NZHC 3487.

⁷ Section 14 of the Supreme Court Act 2003 permits such an application where the court is satisfied that there are exceptional circumstances which justify this.

⁸ *Kumar v R* [2014] NZSC 3.

⁹ *Kumar v R* [2014] NZCA 489.

¹⁰ *R v Hebert* [1990] 2 SCR 151; *R v Broyles* [1991] 3 SCR 595; *R v Liew* [1999] 3 SCR 227.

¹¹ *R v Barlow* (1995) 14 CRNZ 9 (CA); *R v Hartley* CA6/02, 9 May 2002; *R v Szeto* CA240/98, 30 September 1998; *R v Ross* [2007] 2 NZLR 467 (CA).

¹² *R v Swaffield* [1998] HCA 1, (1998) 192 CLR 159.

accused. The issue in relation to the first factor was whether the undercover officers “prompted, coaxed or cajoled” Kumar to respond. The majority considered that the officers had directed the conversation in a systematic and comprehensive manner, and therefore ‘prompted’ the response and actively elicited the information. Kumar’s rights had therefore been breached and the entire conversation should therefore be excluded.

Chief Justice Elias provided a concurring decision. While agreeing with the application of the active elicitation test, her Honour preferred a broader interpretation of the requirements than that they ‘prompted, coaxed or cajoled’ the response of the accused. In her Honour’s opinion, the satisfaction of such a specific test could be strategically avoided by the police. Instead, active elicitation should be understood as being in contradistinction to passive observation. This standard would have been met in the present case.

IV. COMMENTARY

It is interesting to note that the Supreme Court heard three appeals in relation to undercover police operations in 2015.¹³ This provides an indication of the importance being placed on the rights of the accused during criminal investigations. The cases focus on the necessity of balancing the need to maintain the public confidence that those involved in the commission of crime will be punished, with the importance of ensuring that the integrity of the criminal justice system is maintained through appropriate protection of the rights of those individuals being investigated or charged with offending.

In both of the cases discussed above, the Supreme Court considered overseas authorities in detail (particularly Canadian decisions) and decided consistently with these authorities. Overall, the decisions demonstrate a commitment to ensuring that the rights of those under investigation are complied with. Where rights have been breached, attention can turn to identifying an appropriate remedy. It is clear that a breach of rights will not automatically result in a stay being granted or a sentence being reduced. Instead, identifying the appropriate remedy will require the consideration of multiple factors, including any resulting prejudice to the accused, any evidence that the actions of the police indicate an established pattern of practice which might require addressing, and any impact on the public confidence in the judicial system.

¹³ The third being *R v Wichman* [2015] NZSC 198, which had not been fully determined at the time of writing this article.