The Queen v Grosvenor [2014] NTSC 49

PARTIES:	THE QUEEN
	v
	GROSVENOR, Paul Leslie
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21234798
DELIVERED:	23 October 2014
HEARING DATES:	15 to 17 September 2014
JUDGMENT OF:	BARR J

CATCHWORDS:

CRIMINAL LAW – Evidence – retrial – telephone intercept material – inculpatory evidence not led at previous trial – existence of the material not kept secret from the court, trial judge or accused, but content not disclosed – no unfairness or other reason sufficient to justify a stay of proceedings or the exclusion of the evidence at retrial – notice of motion dismissed.

EVIDENCE – Retrial – evidence obtained from search of vehicle – police members had reasonable grounds to suspect that dangerous drugs may be found in the vehicle – evidence admissible – *Police Administration Act 1978* (NT) s 120C(a).

EVIDENCE – Retrial – circumstantial evidence – accused attended third party's residence shortly before his arrest – that residence not searched until 85 days after arrest of accused – evidence of drugs found at search assessed to have low probative value, substantially

outweighed by the danger that evidence would be unfairly prejudicial to the accused – evidence excluded – *Evidence (National Uniform Legislation) Act 2011* (NT) s 135, s 137.

EVIDENCE – Retrial – circumstantial evidence - evidence of rifle and ammunition in the accused's second vehicle – evidence established a connection between the accused and contents of cardboard box containing drugs found in vehicle stopped and searched – probative value not outweighed by the danger of unfair prejudice to the accused – evidence not excluded – *Evidence (National Uniform Legislation) Act 2011* (NT) s 135, s 137.

George v Rockett (1990) 170 CLR 104; *Jago v District Court of New South Wales* (1989) 168 CLR 23, applied.

Barton v R (1980) 147 CLR 75; *Fuller v The Queen* (2013) NTCCA 10; *Grosvenor v The Queen* [2014] NTCCA 5; *Moevao v Dept of Labour* [1980] 1 NZLR 464; *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266; *R v Soteriou* (2013) 118 SASR 119; *R v Maguire* [1992] QB 936; *R v Ulman-Naruniec* (2003) 143 A Crim R 531, referred to.

Criminal Code Act 1983 (NT) s 411
Evidence (National Uniform Legislation) Act 2011 (NT) s 130(1), s 130(4)(c), s 130(4)(e), s 130(5), s 130(5)(a), s 135, s 137, s 138(1), s 138(3)
Police Administration Act 1978 (NT) s 120C(a)

Office of the Director of Public Prosecutions Guidelines (NT) s 8, par 8.1, par 8.2, par 8.17

REPRESENTATION:

Counsel:

Prosecution:	D Morters and D Dalrymple
Accused:	G Newton

Solicitors:

Prosecution:	Office of the Director of Public Prosecutions
Accused:	Halfpennys

Judgment category classification:	B
Judgment ID Number:	Bar1414
Number of pages:	25

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Grosvenor [2014] NTSC 49
No. 21234798

BETWEEN:

THE QUEEN
Plaintiff

AND:

PAUL LESLIE GROSVENOR
Defendant

CORAM: BARR J

REASONS FOR DECISION

(Delivered 23 October 2014)

[1] On 6 October 2014, I gave brief reasons for my decision and rulings in relation to the various pre-trial issues argued before me over three days from 15 to 17 September 2014. I indicated that I would provide more detailed reasons, and I now do so. These reasons are published to the parties in confidence, pending the outcome of a retrial listed for early March 2015.

[2] From 20 to 22 May 2013, the accused stood trial on two counts of aggravated possession of a dangerous drug.[1] He was not represented by counsel at trial.

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[1] Count 1 alleged the possession of a commercial quantity (0.44 grams) of lysergic acid, a Schedule 1 dangerous drug. Count 2 alleged the possession of a traffickable quantity (7.1 grams) of methamphetamine, at that time a Schedule 2 dangerous drug.

[3] On 22 May 2013 he was found guilty by a jury of both counts and of the alleged circumstances of aggravation for each.

[4] The accused then appealed, and on 11 March 2014 the Court of Criminal Appeal allowed the appeal and ordered a retrial.[2]

[5] For present purposes, I refer to and rely on the decision of the Court of Criminal Appeal[3] for a summary of the facts alleged in respect of both offences, and of the evidence at trial:

> [2] Both offences were alleged to have been committed on 18 September 2012. The particulars of count 1 were that the drug possessed was a Schedule 1 drug, namely lysergic acid. The circumstance of aggravation charged was that the amount of the drug was 0.44 grams, a commercial quantity as defined by the *Misuse of Drugs Act 1990* (NT).
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> [3] The particulars of count 2 were that the drug possessed was a Schedule 2 drug, namely methamphetamine. The circumstance of aggravation charged was that the amount of the drug was 7.1 grams, a traffickable quantity as defined by the *Misuse of Drugs Act 1990* (NT).
>
> [4] The appellant was not represented by counsel at trial.
>
> [5] In broad terms, the Crown case was that the appellant was the sole occupant of an Isuzu truck that had been seen by police officers who were conducting a police operation, monitoring a house in Palmerston. The Isuzu truck was observed to attend the house and leave shortly after. Police stopped the truck after it had left the premises. A drug detection dog was utilized by police to search the truck. The dog showed interest in a small cardboard box that, on the Crown case, was located at the rear of the cabin on the middle seat. A police officer conducting the search lifted the small cardboard box out of the back of the cab of the truck and removed a cloth that was

[2] *Grosvenor v The Queen* [2014] NTCCA 5.
[3] *Grosvenor v The Queen* [2014] NTCCA 5 at [2] to [10].

on top of it. Commenting on the relevant area within the truck, the officer said: “It was pretty messy in the rear of the truck where his guns and bits of pieces of material – yeah, so yes, I did remove the box”.

[6] Photographs were taken of the box and its contents after their removal from the truck; neither was photographed in situ. Inside the cardboard box, a small clear container containing methylamphetamine was found. A “Kenwood” box was also inside the cardboard box and contained an ice pipe and LSD tabs. Later testing showed the presence of the appellant’s DNA on the stem and mouthpiece of the pipe. Two sets of digital scales, a mobile phone, a torch lighter and a knife were also found in the box. Photographs of the items found in the search and tendered at trial were received by this Court during the hearing of the appeal.

[7] The police officer who conducted the search and exhibited the items gave evidence at trial as to how methamphetamine is consumed and how it is typically smoked through a pipe.

[8] Aside from finding the drugs in the appellant’s truck, the Crown led evidence that the truck was registered to the appellant’s business. The appellant made no admissions to police. By agreement between the parties, the jury was informed that none of the items found by police, other than the pipe, had been tested for DNA, and that police had been unable to obtain fingerprint evidence.

[9] The appellant gave evidence denying knowledge of the drugs. He told the Court that he went to a house in Palmerston in relation to a job for “Waste Solutions”, who he said were known, at the time of the trial, by the name “Toxfree Solutions”. He said he was apprehended by police just outside of his work place on Mander Road after attending at the house. He said his reason for attending the house was to prepare for excavation and earth works prior to a landscaper commencing work in the front yard.

[10] The appellant told the Court he had previously “dabbled” in certain drugs, acknowledging the evidence, referring to his DNA, of his previous drug use on the pipe. After experiencing certain personal difficulties, he said he “cleaned [his] act up”; that he was also elected to Bees Creek School Council at the beginning of the year and that “[he] hasn’t touched anything since”. He told the jury he did not know of the drugs in his truck and said there was no

> evidence that he had touched the drugs. He referred to the pipe being in a separate box. In cross examination he indicated other persons had used his truck.

[6] The accused was successful in the appeal because the Court found that a previous indication given by him of his intention to plead guilty to the offence charged as count 1 was not a clear acknowledgement of guilt. He should not have been cross-examined about that indication at trial. The Court said that it could not be assumed that the elements of possession, whether the physical requirements of control or the mental element of knowledge, would be known by a lay person. The Court held that the introduction of evidence of the pre-trial indication, in cross-examination, was highly prejudicial.[4] The Court declined to apply the proviso in s 411 *Criminal Code*, on the basis of the following reasoning, at [22]:

> "As already discussed, this was highly prejudicial evidence in the context of a strong circumstantial Crown case. Not only was this evidence likely to affect the jury's consideration of count 1, it may well have affected the assessment of the appellant's credibility generally, including in relation to his denial of his possession of the drugs the subject of count 2. Notwithstanding the strength of the Crown case, the nature of the error and the effect it may have had on the outcome of the trial, in our opinion constitutes a miscarriage of justice."

Issue of new evidence at retrial

[7] The Crown wishes to lead evidence at the retrial, which was not led at the trial. For convenience, I will refer to it as "the further evidence".

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[4] *Grosvenor v The Queen* [2014] NTCCA 5 at [20].

[8] The further evidence is relevant to the mental element of knowledge of possession of dangerous drugs by the accused, and is unfavourable to the accused, or at least would be unfavourable to the accused if the jury interpreted the evidence in the way the Crown contends the jury should.

[9] For the purpose of this ruling it is not necessary that I specify and summarise the further evidence in detail. However, in brief, the accused was the subject of police surveillance and interception of his mobile telephone service between 11 July and 9 November 2012. During the period 14 July 2012 to 18 September 2012, police recorded a number of telephone conversations in which the drugs were referred to, whether by commonly used names for those drugs or by words which the Crown alleges were code words used between the accused and other persons to designate drugs. The audio recordings of eight or more of those conversations are sought to be relied at the retrial.[5]

[10] At least some of the further evidence has the potential to significantly undermine any innocent explanation given by the accused at the trial in relation to his being in possession of lysergic acid and methamphetamine on 18 September 2012.[6] The further evidence is probative of knowledge of possession, an element of both offences.

[5] The content of the conversations relied on is set out in par (a) to par (i) in par 8 of the Crown outline of submissions on the voir dire. See also the Table in par 28.
[6] See, for example, *R v Soteriou* (2013) 118 SASR 119 at [27] – [30].

[11] The accused opposed the admission of the further evidence. Solicitors for the accused filed a notice of motion seeking orders that the proceedings against the accused be permanently stayed; in the alternative, that the telephone intercept evidence be excluded.[7]

[12] In outline, the contention of counsel for the accused was that the police, as the investigating authorities, had an obligation to disclose and provide all relevant evidence, whether such evidence was favourable or unfavourable to the prosecution and defence cases, so that the prosecution in turn could comply with its obligations to disclose such material to the accused. The obligations of the Crown are summarised in the Director's Guidelines,[8] which refer to the "continuing obligation" on the part of the Crown "to make full disclosure in a timely manner of the prosecution case to the offender", including disclosure of all material which on sensible appraisal is "relevant or possibly relevant to an issue in the case and being either inculpatory or exculpatory material." I note that the Director's Guidelines also state that the duty on the prosecution to disclose material to the offender "imposes a concomitant obligation on the police to notify the prosecution of the existence and location of all such material."[9]

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[7] The notice of motion also sought to exclude 'post-offence' evidence relating to another offender, Nathan Corpus, who on the Crown case supplied drugs to the accused on 18 September 2012. I deal with that part of the application by notice of motion at [55] - [57] below.
[8] Exhibit P14, Office of the Director of Public Prosecution Guidelines (NT) Section 8, Disclosure, par 8.1.
[9] Office of the Director of Public Prosecution Guidelines (NT) Section 8, Disclosure, par 8.17. This paragraph was not included in exhibit P14.

[13] The police obtained a vast amount of telephone intercept evidence which was not disclosed and provided, such that, at trial, the accused was not aware of relevant evidence, in particular, the further evidence now sought to be relied on by the Crown.

[14] Counsel for the accused argued that the retrial and proceedings in connection with the retrial should be stayed; alternatively, the previously undisclosed evidence should be excluded at the retrial. Mr Newton argued, in effect, two bases for the orders sought: (1) to avoid unfairness to the accused, in the event that a stay were not granted and the retrial takes place; (2) the need for the court to protect its own processes from abuse or misuse. Mr Newton argued that the criminal adversarial system depends upon the faithful discharge by prosecuting authorities of their responsibilities to make full disclosure, and that did not happen in the present case. Accordingly, unfairness aside, there is a strong policy basis to either stay the proceedings or to exclude the further evidence. Mr Newton made reference to *R v Ulman-Naruniec*[10] to support his submission.

[15] Counsel for the Crown opposed the orders sought by the accused.

[16] In light of the arguments of counsel for the accused, I have examined the context in which telephone intercept ("TI evidence") obtained by police was

[10] [2003] SASC 437; 143 A Crim R 531 (Full Court). Mr Newton referred, inter alia, to a passage from the judgment of Sulan J at [140] where his Honour said, citing *R v Maguire* [1992] QB 936 at 958: "The duty to disclose extends beyond the prosecutorial authority. Those who advise and gather evidence for the prosecutorial authority are under a duty to provide the authority with all relevant information, whether that information is of assistance or is detrimental to the case. All information that has some bearing on the offence or offences charged and the surrounding circumstances of the case must be disclosed."

not provided to the prosecution and accused. The further evidence now sought to be relied on by the Crown is a small part of the overall TI evidence obtained.

[17] In an ongoing investigation into the activities of the accused and at least one other person, Nathan Corpus, police obtained TI recordings of some 6,000 conversations in which the accused participated. I referred to those recordings in [9] above.

[18] The accused was arrested on 18 September 2012, and then charged.

[19] At a time either before or shortly after the arrest and charging of the accused, police determined not to rely on the TI evidence.

[20] The decision was made in the context that police officers considered that evidence of the accused's physical possession of the drugs at the time of his arrest, and the other evidence later adduced at trial, would be sufficient to secure a conviction. However, there was an operational reason for the police decision, namely, the ongoing investigation of Mr Corpus and possibly other offenders involved in a drug syndicate.[11]

[21] Police witnesses at the voir dire hearing were consistent in their evidence to the effect that police made a conscious decision not to disclose the TI evidence because they did not want Mr Corpus (or anyone else) to become aware of the ongoing investigation and the police methodology employed in

[11] Police witnesses at the voir dire hearing referred to the investigation of a 'syndicate',eg, Baldwin at transcript p 31.7; Bentley at transcript p 145.5.

that investigation. The investigation of Nathan Corpus was at that stage continuing, and continued until (at least) 11 December 2012, when Corpus was arrested. Detective Senior Constable Baldwin said that that Corpus was seen as a higher profile target than the accused because police believed Corpus was supplying the accused with methamphetamine and was responsible for the distribution of larger amounts than the accused.[12] In other words, Corpus was supplying the accused and others. In the context that "the team" was conducting "other operations", the team decided, in the words of Baldwin: "We've got him in possession from the traffic apprehension, let's move on."[13] Baldwin agreed in cross-examination by Mr Newton that the telephone intercepts went to the "central issue in the case" in that they related to the accused's knowledge of the drugs in his truck when it was stopped. However, Baldwin said that he wanted to withhold the evidence because of the other ongoing investigations, noting that, in respect of the accused, "they only made him look more guilty".[14]

[22] My understanding of the evidence of Mr Baldwin was that he knew the police had an obligation to disclose any evidence which was exculpatory of or favourable to the accused. However, he considered that the information which police decided to withhold in relation to the accused was inculpatory or unfavourable, and therefore police did not have to disclose it if they did not want it to be used as prosecution evidence at the accused's trial. In my

[12] Transcript p 21.7.
[13] Transcript p 31.3.
[14] Transcript p 29.5.

opinion, there are difficulties with investigating authorities making decisions of that kind without full discussions with the prosecutor whose task is to present the case at trial, or without the benefit of legal advice. In the present case, however, there was a justifiable reason within the Director's Guidelines, namely the need not to compromise ongoing investigations. I refer to that further at [24] below.

[23] Detective Senior Constable McWatt also played a role in the decision not to disclose the TI evidence, in the period from the arrest of the accused up to the time McWatt commenced long service leave on 3 November 2012, after which he resigned from the Northern Territory Police. McWatt explained the decision as follows:[15]

> "For the court, prior to trial, we made the decision not to use that evidence because to continue on with the investigation."

[24] Detective Sergeant Bentley, who was in charge of the "team" referred to by Baldwin, said that the police made a decision before the accused was arrested not to use the TI evidence after his arrest. After the accused had been arrested, the police made a further decision not to include the TI evidence in the prosecution brief.[16] The decision took into account the relative seriousness of the accused's offending, and was made so as not to disclose police methodology and because the investigation into the suspected syndicate was ongoing. Bentley also referred in his evidence to

[15] Transcript p 66.6. Mr McWatt did not take any further part in decision-making by police in relation to non-disclosure of the TI evidence after 3 November 2012.
[16] Transcript p 145.5.

the fact that police understood, for a period of time, that the accused would be pleading guilty to one of the counts.[17] That understanding was correct in relation to the lysergic acid possession charge (count 1), at least for some weeks before and after 26 April 2013. However, the accused always contested the methamphetamine possession charge (count 2) and so I do not consider that the accused's indicated plea of guilty to one charge had any real bearing on the police maintaining the decision not to include the TI evidence in the prosecution brief.

[25] There may be legitimate reasons for police investigators to withhold disclosure of the evidence obtained in a criminal investigation. Such legitimate reasons are reflected in the Director's Guidelines, which acknowledge that disclosure on the part of a prosecutor might not be required in circumstances where disclosure of confidential information may compromise ongoing investigations. The Guidelines acknowledge that there will be circumstances when disclosure should be conditional, delayed or withheld.[18]

[26] In the present case, because an investigation was ongoing, there was a justifiable reason for the police to withhold disclosure of some of the evidence obtained by them, as I mentioned in [22]. However, Nathan Corpus's home was searched and he was arrested on 11 December 2012. Although police witnesses referred in rather vague terms to an ongoing

[17] Transcript p 146.5.
[18] Office of the Director of Public Prosecution Guidelines (NT) Section 8, Disclosure, par 8.2.

operation at that time involving persons other than Nathan Corpus and the accused; and to protection of police methodology, I could not see any compelling public interest[19] reason after 11 December 2012 for police not to disclose the TI evidence to the accused.

[27] Notwithstanding the absence of any compelling reason not to disclose the TI evidence after 11 December 2012, Mr Newton did not argue or submit that the police failed to disclose evidence which was exculpatory or favourable to the accused's defence. Mr Newton cross-examined[20] on the fact that only a very small number, some 14 of the 6,000 conversations intercepted, contained evidence which was obviously incriminating or which, in combination with other evidence, tended to incriminate the accused. In my view, however, the proportionately small amount of unfavourable or incriminating TI evidence is irrelevant if it were nonetheless potent evidence.

[28] I arrived at the conclusion that the police did not withhold from the prosecutor evidence which was exculpatory of the accused or otherwise favourable to the accused. It could not be said in the present case, as it was in *R v Ulman-Naruniec*, that the accused was not provided with material fundamental to his defence of the charges.[21]

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[19] *Evidence (National Uniform Legislation) Act 2011*, s 130(1), s 130(4)(c) and (e), read with s 130(5)(a), and the other sub-paragraphs of s 130(5).
[20] See, for example, transcript p 40.
[21] [2003] SASC 437; 143 A Crim R 531 at [3], per Bleby J.

[29] Moreover, although the police did not disclose to the prosecutor the content of the TI evidence, police did disclose to the prosecutor the existence of the TI evidence. The prosecutor in turn disclosed the existence of such evidence to the Court at two pre-trial mentions attended by the accused.

[30] The first disclosure by the prosecutor was on 26 April 2013, when he informed the court of the possibility of further evidence in the form of telephone intercept material.[22] At that stage, the accused had indicated that he would plead guilty to count 1 (lysergic acid), but maintained that he was not guilty of the offence charged as count 2 (methamphetamine). The accused's counsel had given that indication on his behalf on 11 March 2013 and the accused confirmed that intention when he appeared without counsel on 15 April 2013.[23]

[31] After the pre-trial mention on 26 April 2013, the prosecutor wrote an email to Detective Sgt Bentley, from which I have extracted the following:[24]

> "… I have explained to the Judge that Police need to give consideration to whether they want to be bothered with the cost and inconvenience (and disclosure of Police methodology etc.) of preparing and adducing the TI evidence in a trial in relation to methamphetamine charge against Grosvenor, and that if that evidence is to be adduced we will need 6 to 7 weeks to prepare it."

[32] Detective Sgt Bentley replied the same day to the effect that police "would not be prepared to present the TI material" in evidence.[25]

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[22] Exhibit P7.
[23] Exhibit P7.
[24] Exhibit P11.

[33] The second disclosure in court by the prosecutor was on 3 May 2013, when he referred to further evidence "which had not gone through the committal process" and informed the court as follows:[26]

> "The Police have indicated to me that they do not wish to supplement the brief with that material and they are happy for the matter to just simply run on the basis of the evidence that formed the basis of the initial investigation."

[34] Therefore the existence of the TI evidence was not kept secret from the court, from the trial judge or from the accused. Although the content of the TI evidence was not disclosed, it was always open to the accused to ask for details of the material and seek access to it. It is possible that if he had been legally represented on 26 April and 3 May, such a request would have been made on his behalf. It is also possible, as I assess the hypothetical situation with the benefit of hindsight, that the accused's legal representatives would not have asked to see the material.

[35] I was satisfied that there was no sinister motive for the police withholding the substance or content of the TI evidence. The decision was not made in bad faith. Initially it was made for operational reasons, that is, because of an ongoing investigation. At a later stage the reasons were probably more to do with a reluctance to disclose police methodology and a reluctance also to provide, and possibly have transcribed, thousands of TI audio recordings.[27]

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[25] Exhibit P11.
[26] Exhibits P7, D1.
[27] See the reference by the prosecutor in P11 to police being "bothered with the cost and inconvenience" of preparing the TI evidence.

[36] I was also satisfied that there was no prejudice to the accused in the conduct of his defence at the trial. Indeed, the withholding of the further evidence, and the fact that the unfavourable or incriminating TI evidence was not led in the Crown case, gave the accused a distinct advantage.

[37] For this Court to stay a prosecution for abuse of process would be an extreme step. I had to be satisfied (and I was not) that there had been some fundamental defect going "to the root of the trial", with consequential significant unfairness to the accused which could not be remedied by appropriate orders to relieve against such unfairness at the retrial.[28] Nothing of that kind had been identified. There was (and remains) some *possible* prejudice to the accused for the retrial in that the evidence he gave at the trial might have been different if he had been aware of the further evidence not disclosed to him. For example, the accused may have knowingly given untrue evidence at trial, carefully tailored to the prosecution evidence disclosed and led. He may have inadvertently given untrue evidence at trial, not realising it was untrue, because his memory had not been refreshed by listening to the TI audio material or reading transcripts of the TI evidence. There are several other possibilities. It would be premature for me to decide at a pre-trial stage whether any such disadvantage is truly 'prejudice' as understood by the law. It would also be premature to determine what orders or directions I should give at trial to remedy or relieve against any such

[28] See *Barton v R* (1980) 147 CLR 75 at 111 per Wilson J, cited by Mason CJ in *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 34. See also *R v Ulman-Naruniec* [2003] SASC 437; 143 A Crim R 531 at [16] per Bleby J; at [205] per Sulan J.

prejudice, if true prejudice were established. For example, if the accused were to give evidence at his retrial, it might be necessary to limit his cross-examination in some way, or it might be appropriate to give certain directions to the jury. Those matters stand to be determined at the retrial.

[38] In reaching my decision to refuse the stay application, I considered that the present case was not one where the court process had been misused by those responsible for law enforcement. I was mindful of the statement by Brennan J in *Jago*:[29]

> "An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal proceedings, generally speaking, is to hear and determine whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment. When a criminal process is used only for that purpose and is capable of serving the purpose, there is no abuse of process. … [*An abuse of process*] will generally be found in the use of criminal process inconsistently with some aspect of its true purpose, whether relating to the hearing and determination, its finality, the reason for examining the accused's conduct or the exoneration of the accused from liability to punishment for the conduct alleged against him. When the process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose. But it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused's liability to conviction is discharged by such unfairness. That is a lofty aspiration but it is not the law."

[39] Having decided that there was no unfairness to the accused, or no significant unfairness which could not be remedied by appropriate orders to relieve

[29] *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 47 - 48.

against such unfairness at the retrial, I considered the alternative basis for a stay relied on by the accused, referred to in [14] above. However, the facts of the present case did not justify or necessitate intervention by the court to ensure its processes were used fairly by State and citizen alike and/or to maintain public confidence in the administration of justice. A stay was not necessary to protect the court's ability to function as a court of law in future.[30]

[40] Just as no unfairness was established sufficient to justify a stay, so none was identified sufficient to exclude the further evidence. It remains open to the defence at the retrial to argue the prejudice issue referred to in [37] and to seek orders or directions necessary to remedy or relieve against any prejudice which may be established.

Other issues – the stop and search

[41] The accused objected to evidence obtained by police as a result of the stop and search of the Isuzu truck driven by the accused at the time of his apprehension on 18 September 2012.[31]

[42] Section 120C(a) *Police Administration Act* authorises a member of the Police Force, without warrant, to stop, detain and search a vehicle if the member has reasonable grounds to suspect that a dangerous drug may be found in the vehicle.

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[30] See *Moevao v Department of Labour*, [1980] 1 NZLR 464, per Richardson J at 181, cited by Mason CJ in *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 29 - 30.
[31] See [5] above, indented par [2].

[43] Five police members were involved in the stop and search of the Isuzu truck driven by the accused. However, three of those five police members were more closely involved in the process leading to the decision to stop and search the truck. They were Detective Sergeant Bentley and Detective Senior Constables McWatt and Baldwin, who comprised a three-man investigation team managed by McWatt but for which Bentley had overall responsibility.

[44] The three-man investigation team met in the morning of 18 September 2012, at sometime between 8.00 am and 9.00 am. The members discussed telephone intercept evidence which had come through the previous evening, in particular evidence of a conversation between the accused and a third person which suggested that the accused's supply of drugs was running low.[32]

[45] McWatt explained in evidence that he and his fellow team members knew from "previous investigation information" that, if the accused restocked, he would probably do so at the Palmerston home of Nathan Corpus. As a result, it was agreed that if the accused went to restock on 18 September, police "would look at making, possibly an apprehension, arrest, depending on what went on further during the day". [33] Police continued to monitor the accused's mobile phone. It was ultimately McWatt who said he made the decision to stop and search the vehicle, after further information was received during

[32] Telephone conversation 17 September 2012, starting at 19:44 hours; transcript at tab 3726, part of exhibit P3.
[33] Evidence McWatt at transcript p 53; see also Baldwin at transcript p 12.9-13,17.2; Bentley at transcript p 144.1.

the course of the day.[34] McWatt's decision was made on the basis of (1) information obtained to that stage in the investigation, including information from the phone call made by the accused the previous evening, and another on the day, referred to in footnote 34; and (2) on the further basis of information received that the accused was going to and then did in fact attend the house of Mr Corpus, on whom Police had significant "intelligence holdings".[35]

[46] Notwithstanding that (he said) the decision was his, it was not actually McWatt who stopped the Isuzu truck driven by the accused, although McWatt did participate in the search of that vehicle.[36] Detectives Ramage and McDonald stopped the vehicle. McWatt explained that after he had learnt of the phone conversation between the accused and Mr Corpus at 13.54, referred to in footnote 34, he contacted Detectives Ramage and McDonald to inform them that the accused would be attending the residence of Mr Corpus, and to request that the accused be placed under surveillance.[37] Additionally, Detective Sgt Bentley said that he received information about the phone conversation at 13.54 between the accused and Mr Corpus, whereupon he contacted "another crew" (identified as Ramage and McDonald) who were in the Palmerston area. Bentley said that he told them

[34] Evidence McWatt, transcript p 52.6, 60.6. The further information was to the effect that the accused would be visiting Nathan Corpus later on 18 September. Evidence was led at the voir dire to establish that a conversation had taken place between the accused and Corpus at 13.54 hrs on 18 September in which the accused said he would "head there right now" to collect some replacement sprinklers - transcript at tab 3759, part of exhibit P3.
[35] Evidence McWatt, transcript p 63 - 65.
[36] Evidence McWatt, transcript p 56.5.
[37] Evidence McWatt, transcript p 55.

to assist McWatt and informed them that he had received information which had led him to believe that the accused was going to attend at Mr Corpus's place and pick up drugs. Bentley asked Ramage and McDonald to liaise with McWatt on a radio channel utilised by the Drug Enforcement Section.

[47] When McWatt and Baldwin attended at the home of Mr Corpus, they saw the accused pulling up outside the residence of Mr Corpus in the Isuzu truck.[38]

[48] Subsequently, Detectives Ramage and McDonald stopped the accused's vehicle after allowing him to drive for some 15 - 20 minutes away from the home of Mr Corpus. McWatt said that the accused was allowed to drive a considerable distance so that neither he nor Mr Corpus would connect the arrest of the accused with his earlier visit to the home of Nathan Corpus and thereby make Mr Corpus suspicious that he was being investigated by police. McWatt and Baldwin followed behind the vehicle in which Ramage and McDonald were travelling and would have been less than 30 - 40 metres from Ramage and McDonald when they pulled over the accused's vehicle.[39]

[49] After the vehicle had been pulled over, McWatt and Baldwin searched the vehicle and found the evidence referred to in [5] above.[40]

[50] Notwithstanding that McWatt said that he, McWatt, made the decision to order the stop and search,[41] Detective Senior Constable McDonald said that

[38] Evidence McWatt, transcript p 55.2.
[39] Evidence McWatt, transcript p 55.9.
[40] Indented paragraphs [5] and [6].
[41] Evidence McWatt, transcript p 60.6.

McWatt did not direct him to stop the vehicle.[42] McDonald said that he had his own reasonable grounds to suspect that the accused was carrying dangerous drugs, sufficient to justify the stop and search of the vehicle, after the accused left the home of Mr Corpus.[43] McDonald said that, at the start of his shifts, he would log on and peruse the intelligence reports database, in which he had read references to the accused in relation to "possession and supply", and had also noted that Mr Corpus was "heavily recorded" for supplying methamphetamine. He had also relied on the telephone intercept material provided to him. As a result of all that information, he had reasonable grounds to suspect that the accused was carrying dangerous drugs when he left the home of Mr Corpus. Neither McDonald nor Ramage searched the accused's vehicle. McDonald said that, after he stopped the vehicle, he waited with the accused while other officers (McWatt and Baldwin) searched the vehicle. Ramage acted as exhibits officer.[44]

[51] In *George v Rockett,*[45] the High Court described the difference between suspicion and belief, and explained that the facts which can reasonably ground a suspicion may be insufficient reasonably to ground a belief. The Court explained the meaning of suspicion as follows:

[42] Evidence McDonald, transcript p 54.5.
[43] Evidence McDonald, transcript p 71.4, 73.3.
[44] Evidence Ramage, transcript p 80.8.
[45] *George v Rockett* (1990) 170 CLR 104 at 115.8.

> Suspicion, as Lord Devlin said in *Hussien v Choong Fook Kam* … "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'" The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown.

[52] The Court in *George v Rockett* referred with approval to statement made by Kitto J in *Queensland Bacon Pty Ltd v Rees*[46] that a suspicion that something exists is a "positive feeling of actual apprehension or mistrust, amounting to a slight opinion, but without sufficient evidence".

[53] I was satisfied that all of the police members McWatt, Baldwin, McDonald and Ramage[47] had reasonable grounds to suspect, and did suspect, that a dangerous drug or drugs might be found in the Isuzu truck which was stopped and searched. There was a genuine factual basis for their suspicion. The stop and search without warrant was therefore authorized by s 120C(a) *Police Administration Act*.

[54] I should add that, even if McDonald (who stopped but did not search the vehicle) had not had sufficient reasonable grounds to suspect that a dangerous drug or drugs might be found in the vehicle, I would nonetheless have exercised my discretion pursuant to s 138(1) and (3) *Evidence (National Uniform Legislation) Act 2011* to admit the evidence of drugs

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[46] (1966) 115 CLR 266 at 303.

[47] Because Ramage did not actually stop the vehicle and participate in the search, my finding in relation to him was probably unnecessary. Nonetheless, based on his evidence at transcript p 78, he had been contacted by Detective Bentley who had expressed his belief that the accused was going to Mr Corpus's place to pick up drugs and the basis for Bentley's belief was explained by Bentley to Ramage and understood by Ramage as resulting from a telecommunication intercept in which reference had been made to the accused collecting 'sprinklers'. Ramage was also aware of intelligence information in relation to the accused and Mr Corpus, that they were involved in the supply of methamphetamine.

found as a result of the search. In brief, if McDonald did not himself have sufficient reasonable grounds, he was acting in collaboration with McWatt, Baldwin and Ramage, all of whom unquestionably had reasonable grounds to suspect that a dangerous drug or drugs might be found in the vehicle. Ramage was with McDonald. Both McWatt and Baldwin attended at the scene very shortly after the vehicle had been stopped by McDonald and they carried out the search of the vehicle. The probative value of the evidence found was high and the importance of the evidence in the prosecution of the accused was significant.

Other issues – Nathan Corpus

[55] The accused had also objected to evidence being led at the retrial that, on 11 December 2012, police searched the residence of Nathan Corpus (the same home which the accused had attended shortly before his apprehension on 18 September 2012), and found there two clipseal bags containing 49.85g of a crystalline substance which was analysed as methamphetamine.

[56] In my opinion, that evidence was circumstantial evidence of low or very low probative value in the case against the accused. Significantly, the search of the residence of Nathan Corpus occurred some 85 days after the date on which the accused visited that residence and was then found to be in physical possession of the drugs found in his Isuzu vehicle. There was no evidence of Nathan Corpus being in possession of methamphetamine at his home or elsewhere on 18 September 2012. For ongoing operational reasons,

the police did not search Nathan Corpus or his residence on 18 September 2012.

[57] I considered that the probative value of the evidence was outweighed by the danger of unfair prejudice to the accused.[48] I also considered that the probative value of the evidence was substantially outweighed by the danger that the evidence might be unfairly prejudicial to the accused.[49] I therefore ruled that I should exclude the evidence at the accused's retrial.

[58] The notice of motion must otherwise be dismissed.

Other issues – the rifle and ammunition

[59] I ruled that evidence of a rifle found in the accused's white Corolla vehicle was admissible as circumstantial evidence to establish a connection between the accused and the contents of the cardboard box found behind the driver's seat in the Isuzu truck driven by the accused at the time of his apprehension, which box contained drugs and ammunition for the same calibre rifle as that found in the accused's white Corolla vehicle.

[60] I did not consider that the probative value of the evidence was outweighed by the danger of unfair prejudice to the accused, nor that the probative value of the evidence was substantially outweighed by the danger that the evidence might be unfairly prejudicial to the accused.

[48] S 137 *Evidence (National Uniform Legislation) Act 2011.*
[49] S 135 *Evidence (National Uniform Legislation) Act 2011.*

[61] The ruling in [59] is made on the basis that the jury would not hear any evidence about possible improper use of the firearm.[50] That means there would be no cross examination of the accused as to using the firearm to intimidate or shoot people.[51]

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[50] As indicated by prosecuting counsel at transcript p 163.5.
[51] See, for example, *Fuller v The Queen* (2013) NTCCA 10 at [20], [21], [24] and [47].