IN THE SUPREME COURT OF NEW ZEALAND

SC 112/2013
[2013] NZSC 143

BETWEEN	JOHN LESTER MACKENZIE Applicant
AND	THE QUEEN Respondent

SC 116/2013

BETWEEN	MICHELLE HOETE Applicant
AND	THE QUEEN Respondent

Court:	McGrath, William Young and Glazebrook JJ
Counsel:	M E Goodwin for applicant MacKenzie M L Wotherspoon for applicant Hoete B F Windley for respondent
Judgment:	10 December 2013

JUDGMENT OF THE COURT

The applications for leave to appeal are dismissed.

REASONS

[1] Mr MacKenzie and Ms Hoete seek leave to appeal to this Court against a decision of the Court of Appeal which held that evidence from a camera memory

card, while unlawfully obtained, was admissible under s 30 of the Evidence Act 2006.[1]

Background

[2] Mr MacKenzie and Ms Hoete face charges relating to serious drug offending. They, together with a co-accused, Ms Bladon,[2] challenged the admissibility of evidence obtained by the police in a warrantless search of Mr MacKenzie's car and, following his arrest, a search of Mr MacKenzie himself.

[3] Judge Wiltens determined that the searches had been lawfully conducted and that the evidence was admissible.[3] He further stated that, even if the search had been unlawful, he would have admitted the evidence under s 30 of the Evidence Act 2006.

[4] The crucial evidence for the purposes of the leave application to this Court was derived from the police search of a camera memory card located in Mr MacKenzie's shirt pocket. The photographs on the camera memory card were accessed by a police officer some days after Mr MacKenzie's arrest, without the authority of a search warrant.

[5] The Court of Appeal considered that Mr MacKenzie had reasonable expectations of privacy with respect to the memory card and that there was no evidential basis to suggest that that, at the time of seizing the card, the police had reason to suspect it held evidence relevant to the charges for which Mr MacKenzie had been arrested or to any other criminal offending.[4] In the context of alleged drug offending, the Court considered a camera memory card is distinguishable from a cell phone which is a well-known tool of a drug dealer's trade and therefore one that may contain relevant evidence of such offending.[5]

[6] The Court therefore held that the seizure and examination of the memory card was unlawful and the evidence located on the memory card improperly

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1 *Hoete v R* [2013] NZCA 432 (White, Venning, and Courtney JJ).
2 Ms Bladon abandoned her application for leave to appeal to this Court.
3 *R v MacKenzie* DC Manukau CRI-2012-057-542, 8 April 2013 (Judge Wiltens). Reasons for the decision were given on 7 May 2013.
4 At [24]–[26].
5 At [32].

obtained.[6] However, after undertaking the s 30 balancing process, the Court concluded that Judge Wiltens was correct to rule that the evidence was admissible in this case.[7] The appeals were accordingly dismissed.

Grounds of leave applications

[7] Mr MacKenzie and Ms Hoete seek leave to appeal against the Court of Appeal's decision on the grounds that the Court of Appeal erred in:

(a) its determination of the extent of privacy expectations attaching to images stored on the memory card and as a consequence gave insufficient weight to such privacy expectations in the s 30 balancing exercise;

(b) attaching insufficient weight to the nature of the impropriety of police actions in examining the memory card; and

(c) failing to consider fully Ms Hoete's position and the probative value of the down-stream evidence located at her property.

Our assessment

[8] The issue of when a search of a camera card may be undertaken could be seen to be one of general and public importance. The Court of Appeal, however, held that the evidence in this case was improperly obtained and that decision is not challenged before us in this leave application.[8]

[9] The evidence was held to be admissible in the particular circumstances of this case under s 30 of the Evidence Act. The balancing exercise was undertaken by the Court of Appeal in accordance with established principles. It is not alleged that the Court failed to take into account relevant factors, although there is a challenge to the weight placed on those factors. We accept that the arguments made by the applicants as to weight are said to raise issues of principle as to the proper weight to

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6 At [26] and [34].

7 At [45].

8 Although we assume that, if leave were given, the Crown would renew its arguments made before the District Court and the Court of Appeal that the evidence from the camera memory card was lawfully obtained.

be attached to what are alleged to be the special privacy interest in camera memory cards.[9]

[10] All of the matters Mr MacKenzie and Ms Hoete wish to raise can, however, be raised in any post conviction appeal if they are convicted. There have been no special reasons put forward that would point to any necessity for this Court to hear an appeal before trial.[10]

Result

[11] The applications for leave to appeal are dismissed accordingly.

Solicitors:
Crown Law Office for respondent

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9 In support of this, the applicants cited the Canadian case of *R v Caron* (2011) BCCA 56, (2011) 269 CCC (3d) 15.

10 *Hamed v R* [2011] NZSC 27, [2011] 3 NZLR 725 at [12].