IN THE SUPREME COURT OF NEW ZEALAND

SC 4/2015
[2015] NZSC 189

	BETWEEN	TREVOR JOHN MOMO WILSON Appellant
	AND	THE QUEEN Respondent

Hearing: 7 July 2015

Court: Elias CJ, William Young, Glazebrook, Arnold and Blanchard JJ

Counsel: K H Cook and G Ghahraman for Appellant
M D Downs and Z R Hamill for Respondent

Judgment: 14 December 2015

JUDGMENT OF THE COURT

A The appeal is allowed. The appellant's convictions are quashed.

B There is no order for retrial.

REASONS

WILLIAM YOUNG, GLAZEBROOK, ARNOLD AND BLANCHARD JJ
(Given by Arnold J)

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Introduction

[1] In *R v Horseferry Road Magistrates' Court, Ex parte Bennett*, the House of Lords confirmed that the concept of abuse of process in criminal cases applied to situations where misconduct by the prosecuting authorities rendered a trial, even a fair trial, an abuse of process, even though that misconduct occurred outside the jurisdiction.[1] It did so because, in the words of Lord Griffiths: [2]

> … the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

An important issue in the present appeal is whether a stay of prosecution should have been entered as a result of serious police misconduct in the course of an undercover investigation leading to the appellant's prosecution and conviction following a guilty plea.

Background

[2] After an extensive police investigation into the activities of a motorcycle gang known as the Red Devils, the appellant was charged with five counts relating to the possession, supply and sale of cannabis, party pills and LSD. Nine others were also charged with a variety of offences in the same indictment. In addition, charges were brought against 11 other defendants. In the result, there were 21 defendants facing a total of 151 counts, comprising counts relating to participation in an organised criminal group, supply of methamphetamine or other drugs, conspiracy to cause grievous bodily harm, threatening to kill and other offences against the Crimes Act 1961 and the Arms Act 1983.

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1 *R v Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 AC 42 (HL).
2 At 62.

[3] The police investigation involved the use of undercover officers, interception warrants and other investigative tools. Part of that undercover operation, involving the use of a bogus search warrant and the bogus prosecution of an undercover officer, is at issue. For ease of reference we will refer to this as "the bogus warrant/bogus prosecution scenario" or "the scenario". The Crown accepts that the scenario, which ran for around nine months from late May 2010, involved serious misconduct by the police. As a consequence of that misconduct, the defendants sought a stay of prosecution, on the ground that to put them on trial in the face of such police misconduct would undermine the integrity of the justice system. This application was heard by Simon France J.

[4] On 30 July 2012, when the stay application was part heard,[3] the appellant sought a sentence indication and entered a plea of guilty to all charges against him. On 13 September 2012 he was sentenced by MacKenzie J to an effective term of two and a half years' imprisonment.[4] Subsequently, on 24 October 2012, Simon France J delivered a judgment in which he accepted that the police conduct amounted to an abuse of process sufficient to justify staying the prosecutions of the remaining defendants.[5]

[5] The appellant then appealed to the Court of Appeal against both conviction and sentence. In his appeal against conviction, he sought to vacate his guilty plea in light of Simon France J's decision granting a stay to the other defendants. Before his appeal was heard, the Court of Appeal issued its judgment in *R v Antonievic*, in which it allowed the Crown's appeal against Simon France J's decision and quashed the order for a stay.[6] In light of that, the appellant abandoned his conviction appeal and proceeded only with his appeal against sentence. The Court of Appeal allowed that appeal and substituted sentences of nine months' home detention on each charge for the sentence of two and a half years' imprisonment.[7] Following that, the appellant filed an application for leave to appeal to this Court against his conviction,

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3 Simon France J heard evidence in relation to the stay application on 10 July and 24 August 2012.

4 *R v Wilson* [2012] NZHC 2356.

5 *R v Antonievic* [2012] NZHC 2686 [*Antonievic* (Simon France J)]. Simon France J's judgment is expressed to cover all defendants, including the appellant: see at [75]. But as the appellant had already been sentenced, any order that his prosecution be stayed must be treated as a nullity.

6 *R v Antonievic* [2013] NZCA 483, [2013] 3 NZLR 806 (O'Regan P, French and Asher JJ) [*Antonievic* (CA)].

7 *Wilson v R* [2014] NZCA 584.

raising as the single ground of appeal the correctness of the Court of Appeal's decision quashing the stay granted by Simon France J. By way of relief, the appellant sought the quashing of his convictions and the granting of a stay.

[6] After the Court of Appeal's decision quashing the stay but before this Court had determined the appellant's leave application, the High Court determined applications by the remaining defendants for the exclusion of evidence obtained as a result of the scenario under s 30 of the Evidence Act 2006. Collins J dealt with those applications in two decisions dated 20 February 2015 and 11 March 2015 respectively. In the first, the Judge found that evidence obtained as a result of the scenario in relation to charges which were not serious should be excluded.[8] He did so as a result of what he described as new factual information about the impact of the scenario that was not before Simon France J or the Court of Appeal.[9] In the second decision, the Judge identified those charges that crossed the threshold of being "serious" and ordered that evidence obtained by the police between 1 June 2010 and 11 March 2011 (ie, while the scenario was operating) relating to the charges not characterised as serious be excluded.[10]

[7] In a third judgment delivered on 21 May 2015, Collins J dealt with the defendants' applications to stay the trial of those charges characterised as serious which post-dated 1 June 2010. In light of the new evidence, the Judge granted the applications and stayed the trial of those charges.[11]

[8] Next, on 26 May 2015, this Court granted the appellant's application for leave on the following terms:[12]

> The approved questions are:
>
> (a) Was *R v Antonievic* [2013] NZCA 483, [2013] 3 NZLR 806 correctly decided? And, if not
>
> (b) Does this warrant the quashing of the convictions?

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8 *R v Antonievic* [2015] NZHC 230 [*Antonievic* (Collins J: 1)].
9 At [67]–[73].
10 *R v Antonievic* [2015] NZHC 439 [*Antonievic* (Collins J: 2)]. The Judge subsequently discharged the defendants on the non-serious charges under s 347 of the Crimes Act 1961: see *R v Antonievic* [2015] NZHC 679.
11 *R v Antonievic* [2015] NZHC 1096 [*Antonievic* (Collins J: stay)].
12 *Wilson v R* [2015] NZSC 71.

The second question involves consideration of the circumstances in which the appellant entered his guilty plea and the effect of the granting of the stay on it.

[9] Finally, we should note for the sake of completeness that there was no appeal against the decision of Collins J granting the stay. Mr Downs advised us that there were two reasons for this. First, the Crown considered that the question whether or not a stay should have been granted could be resolved in this appeal given the terms on which leave was granted. Accordingly, the question of principle would be resolved. Second, the Crown considered that the public interest did not require an appeal, having regard to the delay.[13]

Police undercover operation

[10] In September 2009, the police commenced an investigation called "Operation Explorer" into the Red Devils Motorcycle Club in Nelson. The police instigated the investigation because they believed the Red Devils were growing in prominence and intended to become a chapter of the Hell's Angels. The operation involved a covert investigation, including interception of telephone conversations and text messages and the installation of listening devices. Warrants were obtained for these activities.

[11] In late 2009, as part of the investigation, the police decided to deploy a male and a female undercover officer, posing as a couple, to infiltrate the Red Devils. This phase of the investigation was termed "Operation Holy". Some of the Red Devils were suspicious of the male undercover officer (like the Courts below, we will refer to him as "MW"). In early May 2010 one man associated with the Red Devils confronted MW and asked if he was a police officer. Later that month police learned that "word [was] going around Motueka" that MW and the female undercover officer were police agents. The officers supervising MW became concerned that his true identity might be exposed, and decided to implement a strategy to strengthen his credibility among the gang members. Although this involved a number of steps, we will focus on three, namely:

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[13] While we acknowledge the basis for the Crown's decision, we consider the Crown should have sought leave to appeal Collins J's decision directly to this Court, so that that appeal could have been heard in conjunction with the present appeal.

(a) the creation and execution of a false search warrant;

(b) the bringing of false charges against MW; and

(c) the involvement of the Chief District Court Judge.

For ease of presentation, we will deal with the involvement of the Chief District Court Judge before the bringing of the false prosecution.

(a) False search warrant

[12] From early in the investigation, the police had rented a storage unit in MW's name. The police believed, apparently erroneously, that the owner of the storage facility was involved with the Red Devils. As part of the strategy to enhance MW's credibility, the police had placed some apparently stolen items and some equipment that was consistent with involvement in cannabis offending in the storage unit. In response to the suspicions as to MW's true identity, the police prepared a false search warrant in relation to the storage unit. The warrant was in the correct form and was completed in a way that was consistent with a legitimate search warrant. It stated that there existed reasonable grounds to believe that certain items would be located in the storage unit and authorised the search of the unit. Although the warrant purported to be signed by a Deputy Registrar, it had in fact been signed by a police officer, with a signature in the form of an indecipherable squiggle.

[13] When the police went to the storage unit to execute the false warrant, they asked the owner of the storage facility to attend as part of the attempt to enhance MW's criminal credentials. After the warrant was shown to the owner, he opened the unit and saw what was in it. He also provided police with MW's details and the terms on which the storage unit was rented.

(b) Involvement of Chief District Court Judge

[14] Having carried out the search, MW's supervisors contacted their superiors to seek advice on what they should do. A meeting was held and the decision was made to carry through with the ruse. This meant that MW would be arrested and charged

with an offence under the Misuse of Drugs Act 1975. Shortly after this decision was made, two officers visited the then Chief District Court Judge, Chief Judge Johnson.

[15] At the initial evidentiary hearing before Simon France J,[14] Detective Superintendent Drew said that he and Detective Senior Sergeant Olsson visited the Chief Judge on 31 May 2010. At this time, Detective Superintendent Drew was acting as the National Manager of the Criminal Investigations Group and Detective Senior Sergeant Olsson had responsibility for overseeing undercover operations. They gave the Chief Judge a letter in the following terms:

> 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 like now 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 s 12A 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 s 34A of the Misuse of Drugs Act.

[14] That is, the hearing on 10 July 2012.

> 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 necessary.

[16] The officers also gave the Chief Judge a sealed envelope containing a document recording the real name of MW and details about the police operation and the proposed court appearance.

[17] Detective Superintendent Drew said that the meeting lasted for five to ten minutes. The Chief Judge asked "a couple of questions" about the group that was the target of the investigation and did not wish to see the document in the sealed envelope. The Detective Superintendent said that the detectives understood that the Chief Judge had approved the proposal. He also said that the visit to the Chief Judge followed an established police policy for scenario situations. He referred to an extract from the "Undercover Procedures Manual", which indicated that the process that had been followed was in accordance with that manual.

[18] Simon France J expressed surprise that such a protocol could exist and sought more information about the extent of the "established practice". Detective Superintendent Drew recalled only one other example that had taken place in 2002.

[19] Subsequently, after the conclusion of the hearing, the Crown advised the Court that new information about the protocol had come to light. It seems that the document to which Detective Superintendent Drew had referred in his evidence had not been in existence at the time the Chief Judge was approached. It had been written afterwards to reflect the police perception of what had been established as a result of the visit to the Chief Judge in this case, which had been the first of its kind. As a result of this, Detective Superintendent Drew was required to give evidence a second time. Detective Senior Sergeant Olsson also testified on this second occasion.

[20] At the second hearing, Detective Superintendent Drew clarified that the 2002 example had in fact involved a Judge other than the Chief Judge. On the basis of the

material before Simon France J, it was unclear whether this Judge had in fact approved the proposal.[15] At the second hearing the manual as it had existed at the time of the approach to the Chief Judge was produced. It contained no reference to the scenario situation that had featured in Detective Superintendent Drew's initial evidence. It did, however, discuss the possibility of an officer being arrested or charged with an offence, and then stated:

> 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.

Simon France J said he inferred that the focus of this was on the situation of an unplanned arrest of an undercover officer, rather than a staged scenario as in the present case.[16] The Judge accepted that Detective Superintendent Drew had at no stage intended to mislead the court, but concluded nevertheless 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".[17]

[21] Finally, we should note that Simon France J considered that the Chief Judge would not have been alerted to what the police actually proposed on the basis of the information he received.[18] The Court of Appeal agreed with this assessment.[19]

(c) Prosecution on false charges

[22] MW was arrested in public, processed at the police station and then appeared in the District Court. A police officer swore an information charging MW with possession of equipment capable of being used in the commission of an offence in breach of s 9 of the Misuse of Drugs Act. This involved the officer swearing on oath that the officer had just cause to suspect and did suspect that MW had committed the offence. At the bottom of the information form there is a space for the informant to sign, having duly sworn on oath before a Registrar as to the truth of the contents. The officer swore this oath knowing it to be false as he was well aware that MW had

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15 *Antonievic* (Simon France J), above n 5, at [27].
16 At [30].
17 At [34].
18 At [35]–[36].
19 *Antonievic* (CA), above n 6, at [105].

not committed the offence and so could not genuinely suspect that he had. The officer's supervisors also knew that the oath was false.

[23] MW appeared in court and was remanded. The plan was that MW would be represented by the duty solicitor, would enter a guilty plea and would then be sentenced. However, the Red Devils referred MW to a defence lawyer they had previously engaged, who believed that MW was a real defendant and advised him to defend the charge. To keep MW in role, it was decided that he should take the defence lawyer's advice. As a consequence, further appearances in the District Court were necessary. MW deliberately missed some of those scheduled appearances and bench warrants were issued for his arrest. On each occasion the warrants were cancelled when MW voluntarily appeared at a later date. A further charge of breaching bail was laid. Soon after the operation was terminated and the police sought to have the charges withdrawn.

[24] We note that there is no evidence that the Chief Judge passed on anything he had been told by the police to any other judge. Simon France J found that the judges before whom MW appeared knew nothing of the background and believed they were dealing with a genuine case.[20]

Issues

[25] There are two issues before the Court. The first is whether a stay should have been granted and the second is whether the appellant should be granted leave to withdraw his guilty plea, with the result that his convictions would be quashed.

[26] We should say something about how we intend to approach the first issue. As we have said, the sole ground that the appellant gave in his application for leave to appeal was that the Court of Appeal's decision in *Antonievic* was wrong. However, the appellant was not party to that decision, or to the decision of Simon France J as he had pleaded guilty and been sentenced before it was delivered. As well, matters have moved on since the Court of Appeal's decision, in that Collins J has delivered

[20] *Antonievic* (Simon France J), above n 5, at [17].

the three decisions referred to above at [6] and [7], the last of which involved the granting of a stay in relation to the more serious alleged offending.

[27] In two recent decisions which we will discuss in more detail below, *R v Maxwell*[21] and *Warren v Attorney-General for Jersey*,[22] both defendants' appeals, the United Kingdom Supreme Court and the Judicial Committee of the Privy Council respectively have said that the decision whether or not to grant a stay (and the related question of whether a retrial should be ordered) is a discretionary decision and that the question for an appellate court is whether the decision made by the judge was one that was reasonably open to him or her, all relevant factors considered; if so, the appeal will be dismissed even though the appellate court would not itself have reached the same conclusion if considering the matter afresh.[23] While this approach is consistent with the approach that appellate courts generally take to discretionary decisions,[24] it has been criticised in this context as being a departure from earlier cases of high authority and unjustified in an area involving fundamental values.[25]

[28] We have some sympathy for the criticisms that have been made of the approach articulated in *Maxwell* and *Warren*. We make two points. First, where the members of an appellate court conclude that they would have granted a stay in order to preserve the integrity of the criminal justice system, it is not clear why they should defer to the trial judge's contrary assessment on the basis that such assessment was reasonably open to him or her, at least on a defendant's appeal following conviction where the ultimate issue is whether there has been a miscarriage of justice. The values at stake are, after all, of fundamental importance. Second, the context in *Antonievic* was different. Because it was a Crown appeal, the appeal in *Antonievic* was confined to a question of law.[26] The Court of Appeal followed its earlier decision in *R v Vaihu*, where the Court held that the decision to grant a stay involved a question of law, namely whether a stay was a reasonable and proportionate

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21 *R v Maxwell* [2010] UKSC 48, [2011] 1 WLR 1837.

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

23 See *R v Maxwell*, above n 21, at [33]–[38] per Dyson JSC and at [44]–[47] per Lord Rodger (with Lord Mance agreeing with both), *Warren v Attorney-General for Jersey*, above n 22, at [43]–[51] per Lord Dyson, with Lords Rodger and Kerr agreeing, at [63] per Lord Hope, and at [80] per Lord Brown.

24 See *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

25 Patrick O'Connor "'Abuse of Process' after *Warren* and *Maxwell*" [2012] Crim LR 672.

26 This was under s 381A(1) of the Crimes Act. That section has since been repealed and replaced with s 296 of the Criminal Procedure Act 2011, which is materially to the same effect.

response given the factual findings made by the first instance judge.[27] In *R v Gwaze* this Court drew a similar distinction between underlying factual findings and legal assessments made on the basis of them in relation to the admissibility of evidence.[28] There the Court noted that although the determination of questions of admissibility may involve prior determination of facts, that did not change the character of the admissibility assessment, which was one of law. Such an analysis in the present context would justify appellate intervention if the court considered that the first instance judge had erred.

[29] This is not an issue that we need to resolve in the present appeal. Given the unusual procedural history of the case, we propose to approach the question of whether or not a stay should have been granted afresh. We will, of course, have regard to the earlier decisions but will approach the matter on its merits.

Nature of the police conduct

[30] The three elements of the undercover operation which we have identified – the false search warrant, the false charges and the involvement of the Chief District Court Judge – are all troubling.

[31] First, the search warrant was a "false document"[29] for the purposes of the forgery provisions in the Crimes Act.[30] The warrant purported to be something that it was not, namely a valid search warrant. It represented that a Deputy Registrar, a person who had an obligation to act judicially, had turned his or her mind to an application and determined that the requirements for the issuance of a search warrant had been met when that had not in fact happened.

[32] In their evidence before Simon France J, police witnesses referred to the bogus warrant as a "prop", and pointed out that it related to a storage unit that the police themselves had rented. But that cannot justify what occurred. A legitimate search warrant gives the police authority to conduct a search. It evidences that an

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27 *R v Vaihu* [2010] NZCA 145 at [22].
28 *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 at [50].
29 Crimes Act, s 255.
30 Section 256.

independent person,[31] acting in a judicial capacity,[32] has considered the grounds presented by the police and concluded that they justify the search of named property for evidence of specified offending.[33] The bogus warrant was intended to be, and was, treated as if it were genuine by a member of the public (the owner of the storage facility). The warrant was, then, intended to deceive.

[33] As a general rule, a warrant is required to justify a search – warrantless searches are available only in limited circumstances.[34] The independent scrutiny by a judicial or quasi-judicial officer of the justification(s) for a proposed search that is a feature of the warrant process provides an important protection against state abuse of coercive powers.[35] The requirement reflects the importance that our society places upon individual liberty and property rights. There is no doubt that the fabrication and use of a search warrant by the police to further an investigation undermines important legal values, even when the warrant is used in the limited way that occurred in this case.

[34] Second, the bringing of the false prosecution and the visit by the police officers to the Chief Judge are particularly concerning, for two reasons. The first reason concerns the misuse of official documents, in particular the laying of the false information in relation to the possession of equipment charge. As we have noted, the standard form for an information requires that the informant swear to certain things.[36] In relation to MW, the informant's oath was untrue and was known to be so, both by the informant and his superiors. As in the case of the bogus search

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31 In 2010 the issuing of search warrants was governed by the Summary Proceedings Act 1957. Warrants could be issued by "[a]ny District Court Judge or Justice or Community Magistrate, or any Registrar (not being a constable)" (s 198(1)). The term "Registrar" encompassed deputy registrars (s 2). Independent authorisation remains a requirement of the contemporary legislation. "Issuing officers" authorised to issue search warrants under s 6 of the Search and Surveillance Act 2012 include Judges (s 3) and "any Justice of the Peace, Community Magistrate, Registrar, Deputy Registrar, or other person" authorised by the Attorney-General (s 108(1)). Enforcement officers may not be authorised to act as such (s 108(2)).

32 A search warrant "must not be granted lightly", and the act of issuing a warrant "is one to which it is necessary to bring a judicial mind": Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [S S6.08].

33 See s 198(1) of the Summary Proceedings Act and its contemporary analogue in s 6 of the Search and Surveillance Act.

34 As an incident to arrest, for example, or under specific statutory authorisation such as with 20 of the Search and Surveillance Act, which in some circumstances permits warrantless searches of places and vehicles when certain offending against the Misuse of Drugs Act 1975 is reasonably suspected.

35 See Robertson (ed), above n 32, at [S S6.01].

36 See above at [22].

warrant, this shows an unacceptable attitude to documents and processes which are important components of the criminal justice system.

[35] The second reason relates to the constitutional role of judges in New Zealand. As the third branch of government, the judiciary must act independently of the other branches, and must appear to be independent. The independence of judges from the executive, both in appearance and in reality, is critical both to the proper operation of the rule of law and New Zealand's constitutional arrangements, and to the maintenance of public confidence in their operation. If authority is needed for this fundamental proposition, reference can be made to the Latimer House Principles, the Bangalore Principles of Judicial Conduct and s 25(a) of the New Zealand Bill of Rights Act 1990. The Latimer House Principles provide:[37]

> An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.

The Bangalore Principles state:[38]

> Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Finally, s 25(a) confirms that those charged with criminal offences have a right to a fair and public hearing "by an independent and impartial court".

[36] Judges frequently have the responsibility of evaluating the conduct of the executive against legal standards. Judges should be involved in the investigation of criminal offending only to the extent that they have judicial obligations to perform, as when issuing warrants authorising the use of particular investigative techniques (searches, interception of communications and the like). It is quite wrong that judges should be asked to play an active part in investigative techniques involving the bringing and processing of bogus prosecutions as that necessarily involves, at the

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[37] Commonwealth Secretariat and others *Commonwealth (Latimer House) Principles on the Three Branches of Government* (April 2004) at 10.

[38] Judicial Integrity Group *The Bangalore Principles of Judicial Conduct* (2002), Value 1: Independence.

very least, the appearance of a lack of independence and so is corrosive of public confidence in the judiciary.[39] Judges, who should be aloof from the activities of the executive, are conscripted to become participants in those activities. Such involvement is not consistent with the judicial oath, which requires judges to treat all who come before them in accordance with law, equally and without favour.[40]

[37] We acknowledge that Parliament has recognised the legitimacy of police undercover operations and has accepted that such operations may impact on court proceedings. In particular, ss 108 and 109 of the Evidence Act set out a process by which undercover officers can preserve their anonymity by giving evidence in prosecutions under their assumed names, and s 120 allows undercover officers to give depositions or other statements of evidence under their assumed names. But these concessions to undercover police work are limited, in the sense that the sections apply only to specified offences and will generally involve a certificate issued by the Commissioner of Police addressing specified matters (a process which is intended to ensure that, despite witness anonymity, a defendant's right to a fair trial is preserved). Finally, we note that undercover police officers also receive some protection from prosecution for drug offences,[41] which again highlights Parliament's acceptance of the significance of undercover work in that particular context.

[38] However, the existence of statutory provisions such as these simply reinforces the concerns we have expressed. Absent explicit statutory authorisation, conduct such as the use of bogus search warrants and the institution of bogus prosecutions is unacceptable, as Mr Downs readily acknowledged. Mr Downs advised the Court that there would be no further such conduct by the police in the absence of express statutory authorisation.[42]

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39 Simon France J noted that there are occasions where undercover officers are arrested in conjunction with criminal associates and are processed under their assumed names: *Antonievic* (Simon France J), above n 5, at [36]. He discussed this at [47]–[48].

40 The judicial oath is set out in s 18 of the Oaths and Declarations Act 1957.

41 Misuse of Drugs Act, s 34A.

42 Simon France J accepted that it was unlikely that the police would act in this way again: see *Antonievic* (Simon France J), above n 5, at [73].

Stay of prosecution on ground of police misconduct

[39] The power of a court to grant a stay of proceedings has long been recognised as necessary to enable a court to prevent an abuse of its processes. In New Zealand, the existence of this power was confirmed in several decisions of the Court of Appeal, most notably *Moevao v Department of Labour*,[43] where it was accepted that the power applies in respect of both criminal and civil proceedings.

[40] In relation to criminal proceedings, a stay may be granted where there is state misconduct that will:

(a) prejudice the fairness of a defendant's trial ("the first category"); or

(b) undermine public confidence in the integrity of the judicial process if a trial is permitted to proceed ("the second category").[44]

It follows that the analysis is not backward-looking, in the sense of focussing on the misconduct, but rather forward-looking, in that it relates to the impact of the misconduct on either the fairness of the proposed criminal trial or the integrity of the justice process if the trial proceeds.

[41] In the present case, the defendants invoked the second category – they did not suggest that they could not have a fair trial as a result of the actions of the police in the course of the undercover operation. Their argument was that the misconduct of the police in the course of the investigation of the offending was of such a character that a stay was required to protect the integrity of the justice system.

[42] We will discuss the courts' power to grant a stay of prosecution in cases within the second category involving police misuse of their investigatory powers under three headings:

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[43] *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA). *Moevao* was extensively cited in the speeches of members of the House of Lords in *R v Horseferry Road Magistrates' Court, Ex parte Bennett*, above n 1. See also *R v Hartley* [1978] 2 NZLR 199 (CA), a so-called rendition case, and *R v Lavalle* [1979] 1 NZLR 45 (CA), an entrapment case.

[44] See, for example, *R v Maxwell*, above n 21 at [13] per Dyson JSC for the majority; *R v Babos* 2014 SCC 16, [2014] 1 SCR 309 at [31], per Moldaver J for the majority; *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [37]; *Moti v The Queen* [2011] HCA 50, (2011) 245 CLR 456 at [57] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

(a) the underlying rationale of the power;

(b) the approach taken to the exercise of the power; and

(c) the role of causation.

(a) Underlying rationale of power

[43] In *Abuse of Process and Judicial Stays of Criminal Proceeding* Professor Andrew Choo identifies three possible rationales for granting a stay for abuse of process in cases where the police or other state agencies have misused their investigatory powers, namely, the remedial rationale, the deterrence rationale and the moral integrity rationale.[45] According to Professor Choo, the remedial rationale is protective in nature in that it provides a remedy to a defendant for the infringement of his or her rights by state agencies. The deterrence rationale is punitive, utilising the stay as a means of punishing the police for their misbehaviour and so deterring them from future misconduct. The moral integrity rationale is described in the following terms:[46]

> This sees a stay as a means of repudiating the misconduct and thus preserving the purity of the court and of the criminal justice system generally. The court, whose duty is to apply and uphold the law, must disassociate itself from the misconduct rather than effectively to become complicit in the executive's attempts to profit from it.

[44] While the remedial rationale may be relevant to some second category cases (for example, rendition cases), it will not be relevant to all as some second category cases involve no violation of a defendant's rights, so that there is no rights breach to vindicate. Accordingly, we will focus on the other two possible rationales – the deterrence rationale (which we will call the disciplinary rationale for reasons that will become obvious) and the integrity rationale.

[45] In the United Kingdom it is clear that the purpose of granting a stay is not to punish the police or other state agency for misconduct. Rather, the United Kingdom courts have held that stays are granted in this context to uphold the integrity of the

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45 Andrew L-T Choo *Abuse of Process and Judicial Stays of Criminal Proceedings* (2nd ed, Oxford University Press, Oxford, 2008) at 106–113.

46 At 109.

criminal justice system. In *R v Horseferry Road Magistrates' Court, Ex parte Bennett* Lord Lowry identified the two categories of case where the court had a discretion to grant a stay.[47] He described stays in the second category as being granted "because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case".[48] He went on to say:[49]

> I agree that prima facie it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct. Accordingly, if the prosecuting authorities have been guilty of culpable delay but the prospect of a fair trial has not been prejudiced, the court ought not to stay the proceedings merely "pour encourager les autres".

[46] In short, Lord Lowry rejected a disciplinary rationale in favour of an integrity rationale. This has subsequently been affirmed by, for example, Lord Nicholls in *R v Looseley*,[50] by Dyson JSC in *Maxwell*[51] and (as Lord Dyson) in *Warren*.[52] The Supreme Court of Canada has also held that the rationale for granting a stay of proceedings in entrapment cases is the integrity rather than the disciplinary rationale.[53]

[47] However, even though a stay is not granted in order to discipline the police or other relevant state agency, it may well have a deterrent effect on those who committed the misconduct and on others more generally, in the sense that, as a consequence of the granting of the stay, both groups are likely to take greater care in the future. In this way, a stay may deter even if deterrence is not its purpose.[54]

[48] The same position has been adopted in New Zealand. In *Fox v Attorney-General* the Full Court of the Court of Appeal was required to consider whether it was an abuse of process for the police to re-lay informations in relation to charges

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47 *R v Horseferry Road Magistrates' Court, Ex parte Bennett*, above n 1, at 74.
48 At 74.
49 At 74–75.
50 *R v Looseley* [2001] UKHL 53, [2001] 1 WLR 2060 at [17]. *Looseley* is an entrapment case.
51 *R v Maxwell*, above n 21, at [13] and [24].
52 *Warren v Attorney-General of Jersey*, above n 22, at [22] and [37].
53 *R v Mack* [1988] 2 SCR 903 at 938–942 per Lamer J on behalf of the Court.
54 It is for this reason that we have used the term "disciplinary rationale" rather than Professor Choo's "deterrence rationale".

that had been withdrawn by agreement.[55] The defendant was charged with one count under the Crimes Act and three counts under the Arms Act. Following discussions between defence counsel and the police, the Crimes Act count was reduced to a lesser charge and two of the Arms Act counts were withdrawn. The defendant then entered guilty pleas to the reduced Crimes Act count and the remaining Arms Act count and was remanded for sentencing. The Crown Solicitor was to appear at the sentencing hearing. Having reviewed the file, he advised that the pleas entered did not properly reflect the defendant's overall criminality and said he considered that the withdrawn charges should be re-laid. The police accepted his advice and the two withdrawn Arms Act charges were re-laid. The question was whether this constituted an abuse of process of a type that would justify the granting of a stay in relation to the re-laid charges.

[49] Having reviewed English and New Zealand authorities, McGrath J (for the Court) summarised the position as follows:

> [37] These principles set a threshold test in relation to the nature of a prosecutor's conduct which warrants a decision to end a prosecution, prior to trial, as an abuse of process. Conduct amounting to abuse of process is not confined to that which will preclude a fair trial. Outside of that category it will, however, be of a kind that is so inconsistent with the purposes of criminal justice that for a Court to proceed with the prosecution on its merits would tarnish the Court's own integrity or offend the Court's sense of justice and propriety. The power of stay is not available for disciplinary purposes nor to reflect a Court's view that a prosecution should not have been brought. The hallmarks of official conduct that warrant a stay will often be bad faith or some improper motive for initiating or continuing to bring a prosecution but may also be simply a change of course by the prosecution having a prejudicial impact on an accused. Finally, to stay a prosecution, and thereby preclude the determination of the charge on its merits, is an extreme step which is to be taken only in the clearest of cases.

[50] Thus the Court of Appeal accepted the integrity rationale over a disciplinary rationale and also emphasised that, in second category cases, the granting of a stay was "an extreme step which is to be taken only in the clearest of cases".

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55 *Fox v Attorney-General*, above n 44.

(b) Approach to exercise of power

[51] Referring to the second category of case, Lord Steyn said in *R v Latif* that a judge considering a stay application was required to weigh the countervailing considerations of policy and justice and then to decide in the exercise of his or her discretion whether there has been an abuse of process "which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed".[56] Lord Steyn went on to say:[57]

> An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means.

[52] Lord Dyson relied on this passage in giving what was the principal judgment of the Privy Council in *Warren*, also a second category case.[58] Lord Dyson then cited the following extract from Professor Choo's book, in which he summarised the courts' approach to second category cases:[59]

> The courts would appear to have left the matter at a general level, requiring a determination to be made in particular cases of whether the continuation of proceedings would compromise the moral integrity of the criminal justice system to an unacceptable degree. Implicitly at least, this determination involves performing a 'balancing' test that takes into account such factors as the seriousness of any violation of the defendant's (or even a third party's) rights; whether the police have acted in bad faith or maliciously, or with an improper motive; whether the misconduct was committed in circumstances of urgency, emergency or necessity; the availability or otherwise of a direct sanction against the person(s) responsible for the misconduct; and the seriousness of the offence with which the defendant is charged.

[53] Lord Dyson said that this was a useful summary of some of the factors which the courts take into account in carrying out the balancing exercise referred to by Lord Steyn in second category cases, although he also emphasised how important it was to pay particular regard to the circumstances of the individual case.[60] The Judge also

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56 *R v Latif* [1996] 1 WLR 104 (HL) at 112. The other members of the House of Lords concurred with Lord Steyn's judgment. *Latif* was an entrapment case.

57 At 113.

58 *Warren v Attorney-General for Jersey*, above n 22, at [23].

59 At [24], citing Choo, above n 45, at 132.

60 *Warren v Attorney-General for Jersey*, above n 22, at [25].

noted that in rendition and entrapment cases, the court will generally conclude that the balance favours the granting of a stay.[61] This indicates that in cases where the state agency's behaviour is in serious conflict with the rule of law, the balancing process is likely to be reasonably straightforward, in the sense that the enormity of the misconduct will be essentially determinative of the outcome.[62] Finally, Lord Dyson emphasised that whereas the imperative in a category one case is avoiding unfairness to the defendant, the concern in a category two case is with whether the court's sense of justice and propriety would be offended if asked to try the defendant in the particular circumstances.[63]

[54] In *Maxwell*,[64] which was broadly analogous to a second category case,[65] Dyson JSC also emphasised the balancing approach.[66] The Judge went on to say that the gravity of the alleged offence was a factor of "considerable weight" for a court undertaking the balancing process to determine whether to stay proceedings on abuse of process grounds.[67] Dyson JSC also briefly discussed the question of causation,[68] to which we will return. Lord Brown, who gave the principal judgment for the minority, also endorsed the balancing approach. Lord Brown said:[69]

> All the cases I have been considering are cases where, whatever executive or prosecutorial misconduct may have occurred in the past, there is no impediment to a fair trial of the defendant in the future. The central question for the court in all these cases is as to where the balance lies between the competing public interests in play: the public interests in identifying criminal responsibility and convicting and punishing the guilty on the one hand and the public interest in the rule of law and the integrity of the criminal justice system on the other. Which of these interests is to prevail?

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61 At [26].

62 For example, in what was effectively a rendition case, the majority of the High Court of Australia in *Moti v The Queen*, above n 44, acknowledged the need for a balancing process in their statement of principle (at [11]), but when considering the facts, gave decisive weight to the need to protect the integrity of the criminal justice process without discussion of the countervailing public interest in having those charged with serious offending brought to trial. By contrast, Heydon J placed great weight on this second feature of the public interest in his dissenting judgment.

63 *Warren v Attorney-General for Jersey*, above n 22, at [35].

64 *R v Maxwell*, above n 21 .

65 For the full context of the case, see below at [64]–[70].

66 *R v Maxwell*, above n 21, at [19].

67 At [22].

68 At [26].

69 At [98].

[55] Like the United Kingdom Supreme Court, the Supreme Court of Canada has adopted a balancing approach in relation to the second category of case. In *R v Babos* Moldaver J, speaking for the majority of the Court, summarised the position in relation to applications for stay in a criminal context as follows:[70]

> [32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:
>
> (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome"…;
>
> (2) There must be no alternative remedy capable of redressing the prejudice; and
>
> (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" … .

[56] Moldaver J then discussed the application of these three requirements to the two categories of abuse case. Our present interest is in the second category. In relation to that, Moldaver J said of the first consideration:[71]

> [T]he question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial – even a fair one – will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.

[57] In relation to the second consideration – whether there is any remedy short of a stay that is capable of remedying the prejudice – Moldaver J said:[72]

> Where the [second] category is invoked … and the prejudice complained of is prejudice to the integrity of the justice system, remedies must be directed towards that harm. It must be remembered that for those cases which fall solely within the [second] category, the goal is *not* to provide redress to an accused for a wrong that has been done to him or her in the past. Instead the focus is on whether an alternate remedy short of a stay of proceedings will

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70 *R v Babos*, above n 44 (references omitted). Abella J dissented, on the ground that the state behaviour was so outrageous that no balancing was necessary: see [83]–[85].

71 At [35].

72 At [39].

> adequately dissociate the justice system from the impugned state conduct going forward.

[58] Finally, in relation to the last consideration, Moldaver J said:[73]

> [W]hen the [second] category is invoked, the balancing stage takes on added importance. Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits. Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. But in [second] category cases, balance must always be considered.

[59] The Judge went on to say that a stay in the second category of case would be "exceptional" and "very rare", so that a defendant seeking such a stay faced "an onerous burden".[74]

[60] To summarise, when considering whether or not to grant a stay in a second category case, the court will have to weigh the public interest in maintaining the integrity of the justice system against the public interest in having those accused of offending stand trial. In weighing those competing public interests, the court will have to consider the particular circumstances of the case. While not exhaustive, factors such as those listed in s 30(3) of the Evidence Act will be relevant, including whether there are any alternative remedies which will be sufficient to dissociate the justice system from the impugned conduct. In some instances, the misconduct by the state agency will be so grave that it will be largely determinative of the outcome, with the result that the balancing process will be attenuated. The court's assessment must be conducted against the background that a stay in a second category case is an extreme remedy which will only be given in the clearest of cases.

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[73] At [41] (footnote omitted).
[74] At [44].

(c) Role of causation

[61] There is an issue as to the role of causation in this context, often expressed in "but for" terms.[75] For example, in a rendition case, where the accused would not have stood trial "but for" the unlawful conduct of the executive in abducting him or her unlawfully, or an entrapment case, where the accused would not have committed an offence "but for" the wrongful incitement of the authorities, the "but for" link will generally justify judicial intervention. But, as will become clear when we discuss *Maxwell* and *Warren*, a "but for" link is not always sufficient for the grant of a stay, nor indeed is it always necessary. A "but for" analysis tends to focus on the existence (or not) of a *factual* connection between the impugned executive conduct and the defendant's position. But causation questions involve an evaluative element, so that a court may consider that an irrefutable "but for" link (as a matter of fact) is broken or overwhelmed by some other consideration. Conversely, although the absence of a "but for" link will generally be a powerful factor weighing against the grant of a stay, it is conceivable that there may be cases where the absence of such a connection will not be fatal to a stay application.

[62] Where it is alleged that there has been state misconduct which prejudices a defendant's right to a fair trial (ie, a first category case), the defendant will obviously have to demonstrate a connection between the misconduct and the prejudice. As the Supreme Court of Canada held in *Babos*, the judge considering a stay application must then consider whether there is any remedy short of a stay which will enable the defendant to have a fair trial.[76] In *Maxwell*, Lord Brown also noted that the availability of an alternative response was relevant, at least in some circumstances.[77]

[63] However, where the misconduct does not affect the fairness of the trial but rather undermines the integrity of the justice process (ie, a second category case), the fact that there is a connection between the misconduct and the proposed trial will not be decisive in the determination of a stay application, although it will be relevant to

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75 See, for example, *R v Maxwell*, above n 21, at [99] and following per Lord Brown.
76 *R v Babos*, above n 44, at [32] (quoted above at [55]).
77 *R v Maxwell*, above n 21, at [108].

the balancing process. To explain this, we must say a little more about *Maxwell* and *Warren*.[78]

[64] In *Maxwell* the appellant and his brother had been convicted in 1998 of the robbery of two elderly brothers and the murder of one. In 2009, the Court of Appeal of England and Wales quashed these convictions following a reference from the Criminal Cases Review Commission, on the ground that the convictions had been procured by tainted evidence and serious police misconduct. The Court of Appeal then had to consider whether it was in the interests of justice to order a retrial.[79] It concluded that it was in the interests of justice and ordered a retrial. The only issue before the United Kingdom Supreme Court was whether the Court of Appeal was right to do so.[80]

[65] The main prosecution witness against the appellant was a professional criminal who had been imprisoned with the appellant. He was a serving prisoner when he gave evidence at the appellant's trial. In cross-examination, he denied that he was expecting any benefits as a result of giving evidence. The truth was very different. One of the Judges in the minority, Lord Brown, summarised the facts as they later emerged:

> [83] … A large number of police officers involved in the investigation and prosecution of the … robbery and murder case, including several of very high rank, engaged in a prolonged, persistent and pervasive conspiracy to pervert the course of justice. They colluded in conferring on [the witness] a variety of wholly inappropriate benefits to secure his continuing cooperation in the appellant's prosecution and trial. They then colluded in [the witnesses'] perjury at that trial, intending him throughout his evidence to lie as to how he had been treated and as to what promises he had received. They ensured that [the witnesses'] police custody records and various other official documents presented a false picture of the facts, on one occasion actually forging a custody record when its enforced disclosure to the defence would otherwise have revealed the truth. They lied in their responses to enquiries made of the [Crown Prosecution Service] after the appellant's conviction and, in the case of the two senior officers who gave evidence to the Court of Appeal, perjured themselves so as to ensure that the appellant's application for leave to appeal against his conviction got nowhere. To

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78 It must be remembered that the Courts addressed these appeals on the same basis as an appellate court would review the exercise of a discretion by a judge, an approach which we have queried in this context: see above at [27]–[29].

79 Under s 7(1) of the Criminal Appeal Act 1968 (UK), a retrial could be ordered "if it appears to the court that the interests of justice so require".

80 *R v Maxwell*, above n 21, at [3], [11]–[12] and [17] per Dyson JSC, at [44] per Lord Rodger and at [48] per Lord Mance, for example.

> describe police misconduct on this scale merely as shocking and disgraceful is to understate the gravity of its impact upon the integrity of the prosecution process. It is hard to imagine a worse case of sustained prosecutorial dishonesty designed to secure and hold a conviction at all costs.
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> [84] Scarcely less remarkable and deplorable than this catalogue of misconduct, moreover, is the fact that, notwithstanding its emergence through the subsequent investigation, not a single one of the many police officers involved has since been disciplined or prosecuted for what he did.

[66] Following his conviction, the appellant admitted to his lawyer, to prison authorities and to police on numerous occasions that he had been involved in the offences, although he claimed not to have assaulted the brother who died. He appeared to have made these admissions in the hope that his conviction for murder would be quashed and he would then be convicted of manslaughter.[81]

[67] Against this background, the Supreme Court, by a majority, upheld the decision of the Court of Appeal to order a retrial. Dyson JSC, who gave the leading judgment for the majority, noted that the arguments had proceeded on the basis that "in substance, the issue for the Court of Appeal was whether a retrial would be an abuse of process analogous to the question whether a trial at first instance should be stayed on the grounds of abuse of process".[82] Although the Judge accepted the validity of the analogy, he cautioned that it should not be pressed too far, as the question whether it is in the interests of justice to require a retrial is broader than whether it is an abuse of process to allow a prosecution to proceed.[83]

[68] Dyson JSC addressed the causation issue as follows:

> [26] Does it make a material difference that (as in the present case) the evidence without which there would be no order for a retrial consists of admissions which the appellant would not have made but for the original misconduct which led to his conviction and failed appeal? The Court of Appeal considered that the fact that the admissions would not have been made but for the conviction which had been obtained by prosecutorial misconduct was a factor militating against a retrial; but it was no more than one of a number of relevant factors to be taken into account in the overall decision of whether the interests of justice required a retrial. In my view, the court was right to consider that the "but for" factor was no more than a relevant factor and that it was not determinative of the question whether a

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81 This was the view expressed by Lord Brown at [102], where the possibility that the admissions had been made in order to secure an earlier release on parole was also noted.

82 At [12].

83 At [21].

> retrial was required in the interests of justice. It should not be overlooked that the appellant made the admissions entirely voluntarily, no doubt because he considered that it was in his interests to do so. As the court said, there were several relevant factors which had to be weighed in the balance before a final decision could be reached on the question of whether or not the interests of justice required a retrial. The weighing of the balance is fact-sensitive and ultimately calls for an exercise of judgment.

So the fact that there was a connection between the appellant's admissions and the police misconduct did not necessarily mean that a stay had to be granted.

[69] Both Lord Rodger[84] and Lord Mance[85] also regarded the fact that the appellant had made his admissions voluntarily for his own purposes as being important. As Lord Mance put it, "[the voluntary element] breaks the directness of the chain of causation and it relegates the police misconduct to the status of background."[86] By contrast, Lord Brown and Lord Collins in the minority gave decisive weight to the "but for" analysis.[87] The fact that there was this difference of view between the majority and minority indicates that there is an evaluative, as well as a factual, component to the causation analysis.

[70] It should be noted, however, that Lord Brown indicated that a "but for" connection is not invariably required. He said:[88]

> Exceptionally, even in cases of executive misconduct not within the but for category, it may be that the balance will tip in favour of a stay (or, as the case may be, a quashed conviction with no order for retrial), notwithstanding that a fair trial (retrial) remains possible. With regard to cases of this sort, and as to whether (in Professor Choo's language) a trial (retrial) would unacceptably compromise the moral integrity of the criminal justice system, a whole host of considerations is likely to be relevant, including most obviously those which Professor Choo himself lists. I repeat, however, in my judgment only exceptionally will the court regard the system to be morally compromised by a fair trial (retrial) in a case which cannot be slotted into any "but for" categorisation. The risk of the court appearing to condone the misconduct (appearing to adopt the approach that the end justifies the means) prominent in the but for category of cases, is simply not present in the great majority of abuse cases. Rather, as the Board put it in *Panday v Virgil* [2008] 1 AC 1386, executive misconduct ought not generally to confer on a suspect immunity from a fair trial (or retrial).

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84 At [46].
85 At [57].
86 At [57].
87 See [102]–[103] and [105] per Lord Brown and [115] per Lord Collins.
88 At [108].

[71] In *Warren*, the police suspected that the appellants were planning a large scale importation of drugs into Jersey from Europe.[89] They wanted to place tracking and audio monitoring devices in the car which the appellants planned to use in Europe. To do so, they need the permission of the Jersey Attorney-General (who gave it) and of the Belgian, Dutch and French authorities (who authorised the use of a tracking device only).[90] The police asked a senior member of the Jersey Law Officers' Department what would happen if they went ahead with the audio monitoring device and attempted to introduce the unlawfully obtained recordings in evidence. Crown counsel replied that he could not advise the officers to record conversations without the consent of the foreign authorities, but if they did and valuable evidence was obtained, it was unlikely that the Jersey courts would exclude the recordings as evidence solely on the basis that they had been obtained unlawfully. He added "if it was me, I'd go ahead and do it".[91]

[72] The police installed both tracking and audio monitoring devices in the car. The audio monitoring device produced strong evidence of the appellants' guilt. After being charged with conspiracy to import 180 kilograms of cannabis into Jersey, the appellants applied for a stay of prosecution on the grounds of abuse of process. Their application was dismissed. They also sought to have the evidence obtained by the use of the audio monitoring device excluded, on the ground that its admission would adversely affect the fairness of proceedings. This application was also refused. The appellants were subsequently convicted and, after being refused leave to appeal by the Court of Appeal of Jersey, appealed to the Privy Council against the refusal to stay the prosecutions.

[73] The Privy Council was unanimous in dismissing the appeal. Lord Dyson gave the principal judgment. In relation to causation, Lord Dyson said:[92]

> [30] The Board does not consider that the "but for" test will always or even in most cases necessarily determine whether a stay should be granted on the grounds of abuse of process. The facts of the present case

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89 *Warren v Attorney-General for Jersey*, above n 22.

90 The Belgian authorities indicated a willingness to assist (presumably permitting the use of audio devices) if a guarantee of reciprocity were to be given. Such a guarantee was given, but it is unclear what happened thereafter: see at [9].

91 At [7].

92 The "salutary words" of Lord Steyn are from the decision in *R v Latif*, above n 56, and include the passage set out above at [51].

> demonstrate the dangers of attempting a classification of cases in this area of the law and of disregarding the salutary words of Lord Steyn. For reasons which will appear, it is the Board's view that the Commissioner reached the right conclusion in this case, or at least a conclusion which he was entitled to reach. And yet it was accepted at all times by the prosecution that *but for* the unlawful and misleading misconduct of the Jersey police in relation to the installation and use of the audio device, the prosecution in this case could not have succeeded and there would have been no trial unless the police were able to obtain the necessary evidence by other (lawful) means.

[74] Lord Dyson then discussed the decision of the Court of Appeal in *R v Grant*.[93] The appellant in that case, who was charged with conspiracy to murder, applied for a stay on the basis of police misconduct. The police had eavesdropped on and recorded privileged conversations between the appellant and his solicitor following his arrest and in parallel with the interview process. Nothing of any value to the appellant's prosecution was obtained as a consequence. The appellant's application for a stay was dismissed and he was convicted at trial. He appealed his conviction. The Court of Appeal held that the prosecution should have been stayed. The Court considered that the deliberate inference with the suspect's rights in relation to privileged communications seriously undermined the rule of law and justified the grant of a stay even though the appellant suffered no prejudice in fact.[94]

[75] Lord Dyson said that the Privy Council considered the decision in *Grant* to be wrong. Lord Dyson said that the Court of Appeal's approach:[95]

> … suggests that the deliberate invasion of a suspected person's right to legal professional privilege is to be assimilated to the abduction and entrapment cases where the balancing exercise will generally lead to a stay of the proceedings. The Board agrees that the deliberate invasion by the police of a suspect's right to legal professional privilege is a serious affront to the integrity of the justice system which may often lead to the conclusion that the proceedings should be stayed. But the particular circumstances of each case must be considered and carefully weighed in the balance. It was obviously right to hold on the facts in *R v Grant* that the gravity of the misconduct was a factor which militated in favour of a stay. But as against that, the accused was charged with a most serious crime and, crucially, the misconduct caused no prejudice to the accused. This was not even a case where the "but for" factor had a part to play. The misconduct had no influence on the proceedings at all. In these circumstances, surely the trial

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93 *R v Grant* [2005] EWCA Crim 1089, [2006] QB 60.

94 At [54]–[57].

95 *Warren v Attorney-General for Jersey*, above n 22, at [36]. Both Lord Dyson and Lord Brown had expressed doubts about the correctness of *R v Grant* in *R v Maxwell*: see above n 21, at [28] per Dyson JSC and at [96] per Lord Brown.

> judge was entitled to decide in the exercise of his discretion to refuse a stay and the Court of Appeal should not have held that his decision was wrong.

[76] Lord Dyson went on to say that, on its facts, *Warren* was a true "but for" case, involving "very serious" police misconduct.[96] However, this had to be balanced against other factors, including the seriousness of the offence, the fact that the appellants were professional drug dealers on a large scale, the reassurance provided by Crown counsel's advice, the fact that there had been no attempt to mislead the Jersey Court and the fact that there was real urgency about the situation.[97] Lord Dyson concluded that this was a difficult balancing exercise and the decision to refuse a stay was one that was reasonably open.[98]

[77] Lord Brown, who had been in the minority in *Maxwell* in considering that a stay should have been granted in that case, agreed with Lord Dyson in the result in *Warren*. Lord Brown explained the difference between the two cases as he saw it as follows:

> [76] In the Board's judgment in the present case … Lord Dyson notes that, without the product of the unlawfulness here, there would have been no trial and adds: "This was truly a 'but for' case." Naturally I see what he means. I should explain, however, that it was not in this sense that I was using the expression in *R v Maxwell* or suggesting that *R v Maxwell* fell into the 'but for' category. The distinction between the two cases is this: the defendant in *R v Maxwell*, but for the police's misconduct, would never have made the confessions that were to form the basis of his retrial; it was accordingly the misconduct itself which induced Maxwell to act to his detriment. By contrast the misconduct here had no effect whatever upon the appellants' conduct. The present case is a "but for" case only in the sense that, but for the unlawfully obtained evidence, the appellants would not have been prosecuted or convicted: the Crown would not have had sufficient evidence. This, in short, is a "fruit of the poison tree" case – the very distinction I made in para [108] of my judgment in *R v Maxwell* … .

[78] To summarise, a "but for" connection is relevant to the balancing process, but is not necessarily decisive. There are situations where, once a "but for" connection is established between the prosecution and the official misconduct, a stay will almost inevitably be granted. One example is where an accused is facing trial only because he or she has effectively been abducted from another jurisdiction to face trial without

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96 At [46].
97 At [47]–[50].
98 At [51].

proper procedures being followed; another is where an accused has been entrapped into offending by the conduct of state agencies.

[79] In other situations a "but for" connection must generally be established as a matter of fact, but it will not be determinative of the application for a stay. Rather, a broad range of factors will be relevant to the assessment that must be made. We use the word "generally" to allow for the possibility noted by Lord Brown in *Maxwell* that a stay may be justified despite the absence of a "but for" connection, although that is likely to be rare. As the Court of Appeal said in *Antonievic*, the weaker the "but for" connection, the weaker the case for a stay.[99]

[80] It is not possible to lay down a rule in advance to distinguish situations where the presence of a "but for" connection will be decisive from those where it will not. Rather, a consideration of the circumstances of each individual case is necessary. However, like Lord Brown,[100] we consider that in "fruit of the poisoned tree" cases such as the present, if a remedy is required, generally a less drastic remedy than a stay will be sufficient.

This case

[81] As we have said, although the Court of Appeal in *Antonievic* had quashed the stay granted by Simon France J and remitted the charges for trial, Collins J granted a new stay because he considered that he had important information not available to the Court of Appeal. He described the new information in the following way:[101]

> [67] In my assessment, four key pieces of evidence that were before me significantly alter my understanding of the importance of the false warrant and prosecution scenario to the police inquiries into the Red Devils from the impression I gained when reading the judgments of Simon France J and the Court of Appeal.
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> [68] First, Detective Inspector Wormald's evidence drew a link between the false warrant and prosecution scenario and the ability of the police to obtain the interception warrants for which Detective Inspector Wormald applied.

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99 *Antonievic* (CA), above n 6, at [77].
100 See above at [77].
101 *Antonievic* (Collins J: 1), above n 8.

> [69] Second, Detective Sergeant Mackie's affidavit provides firm evidence that the false warrant and prosecution scenario did, at least for a period, satisfy the first objective by allaying the defendants' suspicions about [the undercover officers'] true identities and increasing their credibility.
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> [70] Third, Detective Inspector Wormald's evidence further shows that had there been continued or increased risk to [the undercover agents], the operation would be shutdown to protect them from any danger. Once suspicions were allayed, risks to [the undercover officers] were also reduced.
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> [71] Fourth, and most importantly, it is clear from the police summaries of fact that [MW] was able to successfully bolster the credibility of his fictitious identity as a confidante to some of the defendants after the commencement of the false warrant and prosecution scenario. That scenario dissipated the defendants' wariness and enabled [MW] to gather a great deal of evidence through to the conclusion of Operations Explorer and Holy. Detective Inspector Wormald also confirmed that [MW's] ability to gather eye-witness evidence led to a number of charges, including the organised criminal group charges. It would have been impossible for [MW] to have gathered the evidence he acquired from June 2010 to March 2011 if the defendants had continued to suspect he was a police officer.
>
> [72] On the information before them, Simon France J and the Court of Appeal were persuaded that the false warrant and prosecution scenario only raised a possibility that [the undercover agents] were able to acquire incriminatory evidence as a result of the false warrant and prosecution scenario. The evidence which I have had the benefit of considering firmly establishes that the police achieved all three objectives of the false warrant and prosecution scenario identified by Detective Inspector Wormald. It reveals that the false warrant and prosecution scenario had a far greater impact than Simon France J and the Court of Appeal believed at the time they were considering their judgments.

[82] With respect to the Judge, we doubt that the matters he identified constituted new information of a type which entitled him to depart from the view reached by the Court of Appeal. At the first hearing before Simon France J, Detective Superintendent Drew gave evidence about the bogus warrant/bogus prosecution scenario. The following exchange occurred during his cross-examination:

> Q You would agree wouldn't you that this whole orchestrated scenario was designed to enhance the apparent criminality of the undercover constable?
>
> A To enhance his criminality, to enhance his cover, to enhance his safety, they were all linked.
>
> Q And to enhance the prospect that he would be accepted by the targets of the operation, agreed?
>
> A Yes, of course, they are all linked together.

> Q And thus have access to evidence gathering to support charges against those targets?
>
> A Evidence gathering, or intelligence gathering, absolutely, that was the purpose for being there.

[83] As can be seen, the Detective Inspector acknowledged that the purpose of the scenario was to enhance the credibility of the undercover officers so that they could continue to gather evidence to support charges against members of the Red Devils.[102] It appears that the failure of the scenario to remove the Red Devils' suspicion of MW was relevant to Simon France J's factual findings. In the context of considering the effect of the scenario on the defendants' rights, he said:[103]

> [41] Here the rights of the defendants have not been violated. They may have been duped into thinking MW was legitimate, but it seems suspicions 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.

Later, addressing the question of a causal link between the misconduct and the evidence underlying the charges ultimately laid, the Judge said:

> [69] The lack of any strong causal connection is significant. I was not convinced by the efforts of the defendant' 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.

The Judge concluded nevertheless that the charges were a "product" of the police undercover work. He said:

> [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.

[84] Having reviewed the evidence before Collins J we do not see that it takes matters significantly further. As the Judge said, Detective Inspector Wormald acknowledged that the role performed by the undercover officers enabled the police

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[102] There was a further acknowledgement by the police of the evidence gathering purpose of such undercover operations in the second hearing before Simon France J.

[103] *Antonievic* (Simon France J), above n 5.

to continue to investigate and gather evidence about the activities of the Red Devils, albeit that he thought the scenario had had limited impact. But Detective Superintendent Drew had acknowledged that the scenario enabled the police to continue to gather evidence before Simon France J, so it was not new information. Simon France J's caution about the impact of the scenario was based on what was later said in the intercepted communications,[104] a point which Collins J does not appear to address.

[85] Moreover, the indictment charging the appellant covered both specific dates and time periods within the time frame that the scenario was underway, so it must have been obvious to Simon France J and the Court of Appeal that the police were continuing to gather evidence throughout the relevant period, including by means of the undercover officers. Indeed, the Court of Appeal acknowledged this (although it did consider that the evidence would have been available even if the police had not engaged in the misconduct).[105]

[86] Overall, the evidence suggests that the scenario did assist the police to continue with the undercover operation, but it was not effective in eliminating suspicion of MW, so that risks remained. We are not convinced that this takes matters significantly further than what was understood by Simon France J and the Court of Appeal.

[87] In any event, even if Collins J was correct that he had significant new information, that did not necessarily mean that he should have granted a stay. Having drawn a distinction between excluding unfairly obtained evidence under s 30 of the Evidence Act and granting a stay, the Judge concluded:[106]

> [65] My understanding of the purpose of s 30(3)(d) of the Evidence Act is that it aims to give primacy to the desire to bring the most serious offenders to trial. The same weight is not necessarily given to the seriousness of alleged offending when a Court considers a stay application. This reflects the primacy in stay applications upon maintaining a criminal justice system that is above reproach, particularly when the stakes for a defendant are high.

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104 At [41].
105 *Antonievic* (CA), above n 6, at [108]. See also [109]–[110].
106 *Antonievic* (Collins J: stay), above n 11 (footnotes omitted).

> [66] My understanding of the law reflects the way stay applications have been decided in cognate jurisdictions. For example, the Court of Appeal of England and Wales in *R v Grant* allowed an appeal against conviction on a charge of conspiracy to murder. The stay application was declined at first instance even though it was established the police had deliberately recorded privileged conversations that took place between the defendant and his solicitor in a police station. The Court of Appeal allowed the appeal on the basis that the misconduct of the police was so grave that the proceeding should have been stayed in order to protect public confidence in the criminal justice system. Similarly, in *R v Maxwell*, the appellant's convictions for murder and robbery were quashed on appeal by the United Kingdom Supreme Court after it emerged that the police had misled the trial Court by concealing and lying about various benefits that the main prosecution witness had received in exchange for giving evidence.

[88] We make four comments about these extracts:

(a) First, while we agree that considering whether to exclude evidence and whether to grant a stay are different processes, the considerations relevant to each may have a good deal of commonality.[107] The seriousness of the alleged offending is relevant in both contexts.

(b) Second, it is not clear precisely what the Judge meant when he said that s 30(3)(d) "aims to give primacy to the desire to bring serious offenders to trial". The seriousness of the alleged offending is a relevant and important consideration in the s 30(2)(b) balancing assessment, but we do not see it as having "primacy". As Tipping J noted in *Hamed v R*, the seriousness of the offending is a consideration which is "apt to cut both ways":[108]

> [W]hile the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the stakes for the accused are high.

Similar observations were made by Elias CJ[109] and Blanchard J.[110]

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[107] See, for example, *R v Latif*, above n 56, at 109 per Lord Steyn (delivering a judgment with which the other members of the House of Lords agreed). But cf *R v Looseley*, above n 50, at [18] per Lord Nicholls.

[108] *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [230] (see also at [239]), citing *R v Grant* 2009 SCC 32, [2009] 2 SCR 353.

[109] *Hamed v R*, above n 108, at [65].

[110] At [187].

(c) Third, the Judge was wrong to rely on *Grant* in the way that he did. In *Maxwell*, Dyson JSC and Lord Brown (delivering the principal judgments for the majority and minority of the Supreme Court respectively) both doubted the correctness of the Court of Appeal's decision in *Grant*.[111] In *Warren*, the Privy Council disapproved it,[112] and both the New Zealand Court of Appeal (in *Antonievic*)[113] and the Court of Appeal of Hong Kong (in *HKSAR v Ng Chun To Raymond*)[114] have refused to follow it. All this was readily apparent from the Court of Appeal's judgment in *Antonievic*.

(d) Fourth, the Judge misunderstood *Maxwell*. The Supreme Court did not quash the appellant's convictions for robbery and murder as the Judge indicates at [66] of his judgment. The Court of Appeal had quashed the convictions and there was no appeal in respect of that determination. The only issue before the Supreme Court was whether the Court of Appeal was right to order a retrial (which the Supreme Court treated as being broadly equivalent of granting a stay).[115] By a majority, the Supreme Court concluded that the Court of Appeal's decision to order a retrial was one that was reasonably open to it in the circumstances. Accordingly, it refused to intervene. The seriousness of the offending appears to have been a significant consideration for the majority.[116]

[89] Finally, we note that in his first decision, Collins J ruled that evidence from the period while the scenario was in effect could not be led in respect of the less serious offending.[117] In his judgment granting the stay,[118] the Judge does not explain why this remedy was not sufficient to protect the integrity of the justice process, so that a stay was required. This is an important issue, which should have been addressed as part of the balancing process.

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111 See *R v Maxwell*, above n 21, at [28] per Dyson JSC and at [96] per Lord Brown.
112 *Warren v Attorney-General for Jersey*, above n 22, at [36].
113 *Antonievic* (CA), above n 6, at [93].
114 *HKSAR v Ng Chun To Raymond* [2013] HKCA 380 at [100]–[105].
115 See above at [64] and [67].
116 *R v Maxwell*, above n 21, at [22] per Dyson JSC.
117 *Antonievic* (Collins J: 1), above n 8.
118 *Antonievic* (Collins J: stay), above n 11.

[90] In the result, then, we consider that Collins J did not have a proper basis for not following the decision of the Court of Appeal. However, this does not answer the question whether we are in agreement with the Court of Appeal that no stay should have been granted.

[91] Turning to that question, we reiterate what we have already made plain, namely that conduct of the type that occurred in this case is unacceptable and constitutes serious misconduct. We well understand that the police face difficulties in investigating certain types of offending, including organised drug offending. But that cannot justify preparing and using bogus search warrants or bringing bogus prosecutions in the courts. If the public are to have confidence in the rule of law, they must have confidence in the independence of the judiciary and the genuineness of court processes. The bogus warrant/bogus prosecution scenario had the capacity to undermine that confidence significantly.

[92] That is obviously a powerful consideration in favour of granting a stay. Other considerations relevant to the balancing process are:

(a) The seriousness of the offending. We assess the offending as being moderately serious.

(b) The impact of the scenario. The scenario did not cause the Red Devils to offend, as in an entrapment case, nor did it involve any breach of the protected rights of the Red Devils. Rather, the scenario, at best, enabled the police to continue to gather evidence of the Red Devils' offending. To that extent, this is, like *Warren*, a "fruit of the poison tree" case. There was, however, some direct interference with the rights of others, namely the owner of the storage unit. Although the unit was leased to the police, the owner was presented with an apparently genuine warrant and was asked to act on it, which he did by unlocking the unit.

(c) Attitude of police. There was no evidence that the police misconduct was systemic, in the sense of being simply one example of such

misconduct among many. Rather, it seems to have been a "one off" incident, which will generally be less threatening to the integrity of the criminal justice system than ingrained or regularised misconduct. It is surprising, given the nature of what was involved, that the police did not seek legal advice about the scenario before it was put into operation.[119] On the other hand, the police thought they had the consent of the Chief District Court Judge to the bogus prosecution, although like the Courts below we think it unlikely that the Chief Judge did agree to what the police intended. Looking at the matter overall, we agree with the Courts below that the police acted in good faith, but consider that they should have done more to obtain a proper appreciation of the values and interests at stake. Their failure to do so was a significant oversight.

(d) Urgency. While it may be that the police needed to take action to shore up the credibility of the undercover officers among the Red Devils, there is no indication that the situation was urgent – other responses to the perceived threat are likely to have been available.

(e) Alternatives. There is general acceptance in the authorities that a stay in a category two case is an extreme remedy which should be given only in the clearest of cases. This means that it is important to consider whether there are alternative remedies which adequately address the interests at stake. One of the surprising features in *Maxwell* was that none of the police officers involved in the misconduct (which was egregious, involving, among other things, perjury and perverting the course of justice) faced criminal or disciplinary proceedings. This weighed heavily with Lord Brown in his minority judgment.[120] In the present case, Collins J excluded evidence obtained during the operation of the scenario in relation to the less serious charges but permitted it to be led in relation to the more serious charges. This would, in our view, have been a sufficient

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119 *Antonievic* (Simon France J), above n 5, at [34].
120 *R v Maxwell*, above n 21, at [84].

> response based on the need to preserve the integrity of the justice system and the courts' processes.

[93] On balance, we conclude, in agreement with the Court of Appeal, that no stay should have been granted. Although the misconduct was serious, in general the factors identified above in [91]–[92] indicate that this is not one of those rare cases where a stay should be granted. There is no evidence of a systemic problem, there was no bad faith, there is no likelihood of a repetition of the conduct at issue, the scenario simply facilitated the continued gathering of evidence of offending which occurred independently of the police misconduct and a remedy has been granted (albeit that it is limited to the non-serious offending).

[94] As the only ground on which the appellant sought to withdraw his guilty plea and have his convictions quashed was that the Court of Appeal's decision in *Antonievic* was wrong, this is sufficient to deal with the appeal.

[95] However, because the Crown has not appealed the decision of Collins J granting the stay, the position is that the prosecutions have been stayed against virtually all the defendants except the appellant. There is arguably some unfairness as a consequence. Accordingly, we will go on to consider whether the appellant's convictions should, in these circumstances, be quashed.

Conviction following guilty plea

[96] In *R v Le Page* the Court of Appeal considered the circumstances in which an appeal against conviction would be entertained following a guilty plea.[121] Delivering the judgment of the Court, Panckhurst J said:[122]

> [I]t is only in exceptional circumstances that an appeal against conviction will be entertained following entry of a plea of guilty. An appellant must show that a miscarriage of justice will result if his conviction is not overturned. Where the appellant fully appreciated the merits of his position, and made an informed decision to plead guilty, the conviction cannot be impugned. These principles find expression in numerous decisions of this Court, of which *R v Stretch* [1982] 1 NZLR 225 and *R v Ripia* [1985] 1 NZLR 122 are examples.

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121 *R v Le Page* [2005] 2 NZLR 845 (CA).
122 At [16].

[97] Panckhurst J went on to identify three broad situations in which a miscarriage of justice would be indicated, namely where:[123]

(a) the appellant did not appreciate the nature of, or did not intend to plead guilty to, a particular charge;

(b) on the admitted facts, the appellant could not in law have been convicted of the offence charged; and

(c) the guilty plea was induced by a ruling which contained a wrong decision on a question of law.

[98] Obviously the appellant could not bring himself within one of these three broad categories. Mr Cook argued that the law as set out in *Le Page* was too limited and that a broader approach should be taken so as to encompass situations where to allow a conviction to stand would undermine the integrity of the criminal justice process. He relied on three decisions of the English courts – *R v Mullen*,[124] *R v Togher*[125] and *R v Maguire and Heffernan*.[126]

[99] In *Maguire and Heffernan*, the Court of Appeal encapsulated the English position as follows:[127]

> [3] The relationship between a plea of guilty and the possibility of subsequent appeal is carefully set out in the line of cases which begins with *Chalkley and Jeffries* [1998] 2 Cr App R 79 and which progresses via, amongst others, *R v Mullen* [1999] 2 Cr App R 143 up to *R v Togher* [2001] 1 Cr App R 33.
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> [4] *Of course, if a prosecution is a result of flagrant executive misconduct such as to make it an abuse of the process of the court, then an appeal can be entertained here even if the accused pleaded guilty. That is because it is an abuse for the man to be tried at all.* Similarly, if on agreed or assumed facts the judge wrongly rules that such facts amount to the offence, his decision can be challenged on appeal after a plea of guilty. In such a case his ruling deprives a defendant of any legal escape from conviction.

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123 At [17]–[19].
124 *R v Mullen* [2000] QB 520 (CA).
125 *R v Togher* [2001] 3 All ER 463 (CA).
126 *R v Maguire and Heffernan* [2009] EWCA Crim 462.
127 Emphasis added.

[100] The decision in *Togher* is instructive. The appellants were each charged with two drug offences, which for case management reasons were to be tried separately. They stood trial on one offence and were convicted. They then sought to appeal against their convictions. Before their appeal was determined, the appellants entered pleas of guilty to the other offence. Subsequently, their appeals against conviction on the first offence were allowed and a retrial was ordered. The appellants then applied for a stay of the retrial on the ground of abuse of process, alleging among other things that the prosecution had not met its disclosure obligations. The appellants were not aware of the matters constituting the abuse of process when they entered their guilty pleas to the other offence.

[101] The trial Judge granted the appellants' application for a stay of the retrial. Following that, the appellants appealed their convictions for the offence to which they had entered guilty pleas, arguing that the trial Judge's view that there was an abuse of process applied equally to that offence, with the result that they should not have been required to plead to it.

[102] The Court of Appeal dismissed their appeals, holding that the Judge was wrong to have granted a stay of the retrial. In doing so, the Court discussed the judgment of Auld LJ (for the Court) in *R v Chalkley*.[128] In that case, after analysing earlier authorities, Auld LJ identified the circumstances in which a court might intervene following a guilty plea, taking what he described as a narrow view of what was permissible. Auld LJ said:[129]

> In appeals against conviction following a plea of guilty, the somewhat mechanical test of whether a change of plea to guilty was "founded upon" a particular feature of the trial, namely a wrong direction of law or material irregularity, gives way to the more direct question whether, given the circumstances prompting the change of plea to guilty, the conviction is unsafe. However, even when put that way, the good sense of preferring the narrower interpretation, which we have identified, of the expression "founded upon" lingers on. Thus, a conviction would be unsafe where the effect of an incorrect ruling of law on admitted facts was to leave an accused with no legal escape from a verdict of guilty on those facts. But a conviction would not normally be unsafe where an accused is influenced to change his plea to guilty because he recognises that, as a result of a ruling to admit strong evidence against him, his case on the facts is hopeless. A change of

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128 *R v Chalkley* [1998] QB 848 (CA). Also reported as *Chalkley and Jeffries* [1998] 3 Cr App R 79 (CA).

129 At 864.

> plea to guilty in such circumstances would normally be regarded as an acknowledgement of the truth of the facts constituting the offence charged.
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> We qualify the above proposition with the word "normally", because there remains the basic rule that the Court should quash as unsafe a conviction where the plea was mistaken or without intention to admit the truth of the offence charged.

[103] The Court in *Togher* did not question this passage, but effectively qualified it by saying:[130]

> [36] We would not wish to question this passage in the judgment of Auld LJ. *However, it cannot be applied to the situation which exists here, where the defendants were unaware of the material matters alleged to amount to an abuse of process. If they could establish an abuse, then this Court would give very serious consideration to whether justice required the conviction to be set aside.* We would, however, emphasise that the circumstances where it can be said that the proceedings constitute an abuse of process are closely confined. The reason for this is that the majority of improprieties in connection with bringing proceedings can be satisfactorily dealt with by the court exercising its power of control over the proceedings. It has to be a situation [where] it would be inconsistent with the due administration of justice to allow the pleas of guilty to stand.

The Court went on to hold that the appellants could not establish an abuse sufficient to justify the granting of a stay.

[104] We accept Mr Cook's submission that the summary in *Le Page* is incomplete because it does not recognise the possibility that a conviction following a guilty plea may be quashed on appeal (and no retrial ordered) where there is an abuse of process of a type that would justify the granting of a stay in order to preserve the integrity of the justice system. In principle, where an abuse of process by the police or prosecuting authorities is sufficiently significant to justify the granting of a stay, the fact that a defendant has entered a guilty plea should not prevent him or her from appealing against conviction in reliance on the abuse of process. The entry of the stay in this type of case indicates that the prosecution should not have gone to trial for reasons based on the public interest. The fact that a conviction results from a guilty plea rather than a trial should not change the position, at least in principle.

[105] There is a material distinction between the facts in *Togher* and those in the present case, however. As noted, in *Togher* the appellants were not aware of the

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130 *R v Togher*, above n 125 (emphasis added).

police misconduct that was said to constitute the abuse of process at the time they entered their guilty pleas. Their decision to enter guilty pleas was not, therefore, a fully informed one.

[106] By contrast, the appellant in the present case was aware that an application had been made to stay all prosecutions (including his) on the ground of abuse process. He entered his guilty pleas after the stay application had been argued but before judgment was given. Importantly, he was represented by counsel. As is made explicit in the appellant's notice of appeal against conviction to the Court of Appeal, the appellant decided for his own reasons to plead guilty despite the unresolved stay application. In that notice, the appellant acknowledges that he was aware of the stay application, that he discussed it with his lawyer and that he expected to benefit on sentencing because he was prepared to plead guilty despite the application. Accordingly, the appellant made an informed decision to enter his guilty plea and arguably should be held to that decision.

[107] As against that, the appellant's offending was relatively minor, particularly the three charges relating to the class C drugs (cannabis and party pills). Those counts essentially concerned supply or potential supply to friends or acquaintances rather than being part of a commercial operation, and are likely to have fallen within the category of non-serious offending in respect of which Collins J excluded any evidence gathered between June 2010 and March 2011. The other two charges related to the possession and supply of LSD, a class A drug, and so were potentially more serious. However, Collins J placed similar charges faced by another accused in the non-serious category.[131]

[108] An appeal against conviction following a guilty plea will not be allowed simply because the plea was entered following a ruling that particular evidence was admissible and that ruling has subsequently been overturned.[132] Moreover, the appellant in this case was, as we have said, fully aware of the stay application before he entered his guilty pleas, and so made an informed decision. However, the present case is most unusual because the Crown has not appealed the decision staying the

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131 See *Antonievic* (Collins J: 2), above n 10, at [55]–[57].

132 See, for example, *R v Chalkley*, above n 128.

prosecution of the more serious offending by others associated with the Red Devils. Although we have held that this stay should not have been granted, against the background that it was granted and that the co-defendants have had the benefit of a decision that there was an abuse of process sufficient to justify a stay, we consider that it would be unfair to allow the appellant's convictions to stand, and would constitute a miscarriage of justice. Given the unusual circumstances of the case, we consider that we should allow the appeal and quash the appellant's convictions.

Decision

[109] The appeal is allowed. The appellant's convictions are quashed. There is no order for retrial.

ELIAS CJ

[110] I agree with the reasons given by Arnold J for concluding that the convictions entered against the appellant must be quashed and agree that there should be no order for retrial.

[111] I write separately because I differ from the majority in being of the view that, if the convictions had not been quashed without retrial being ordered, the appeal should in any event have been allowed and the prosecution of the appellant stayed for abuse of process. I write briefly because the dispositive reasons in which I concur for allowing the appeal and quashing the convictions without ordering retrial make it unnecessary to do more than indicate my reservations about the approach to stay for abuse of process favoured by the other members of the Court and explain why I would conclude that the decision of the Court of Appeal in *R v Antonievic*[133] was wrong. I am of the view that the prosecutions in that case were properly stayed by Simon France J.[134] This conclusion overtakes the second stay order granted by Collins J.[135]

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133 *R v Antonievic* [2013] NZCA 483, [2013] 3 NZLR 806 (O'Regan P, French and Asher JJ).
134 *R v Antonievic* [2012] NZHC 2686 (Simon France J stay judgment).
135 *R v Antonievic* [2015] NZHC 1096 (Collins J stay judgment).

History of the appeal

[112] The appeal against conviction is effectively a direct appeal to this Court.[136] The appellant's convictions were appealed to the Court of Appeal but the appeal was treated as abandoned in the Court of Appeal when the appellant did not seek to argue the conviction appeal at the hearing.[137]

[113] The appellant had originally been charged with 20 others in respect of offending (principally drug related) carried out by members and associates of the Red Devils motorcycle club, with which the appellant was associated.[138] The appellant pleaded guilty after a sentence indication. Following his conviction, the prosecution against his co-offenders was stayed by Simon France J in the High Court on the grounds that to proceed with the trial would amount to abuse of process.

[114] The appellant then filed an appeal against conviction, seeking to set aside his guilty plea and to obtain the benefit of the stay. The reason the conviction appeal was not persevered with at the hearing was that between filing the appeal and the date of hearing the Court of Appeal delivered its decision in *Antonievic*, overturning the stay decision in the High Court.[139]

[115] After the appeal was filed, but before it had been heard, Collins J granted a fresh stay of the proceedings against the co-offenders, on the basis that additional evidence not available to the Court of Appeal or Simon France J tipped the balance.[140] That decision was not appealed by the Crown.[141]

[116] The proceedings against all co-offenders having either been stayed or discharged under s 347 of the Crimes Act 1961 for lack of evidence (in relation to the lesser charges in respect of which Collins J had excluded the evidence as

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136 See *Wilson v R* [2015] NZSC 71.

137 *Wilson v R* [2014] NZCA 584 (Miller, Lang and Clifford JJ).

138 Mr Wilson was named on an indictment with nine others. The charges against the other 11 defendants were brought in a separate indictment.

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

140 *R v Antonievic* [2015] NZHC 1096 (Collins J stay judgment).

141 Collins J had earlier excluded evidence against the co-offenders in relation to charges that he did not consider serious, which meant there was insufficient evidence to proceed to trial in relation to them: see *R v Antonievic* [2015] NZHC 230 (Collins J exclusion ruling 1) and *R v Antonievic* [2015] NZHC 439 (Collins J exclusion ruling 2). It was the remaining serious charges which were the subject of the subsequent stay.

improperly obtained),[142] the appellant now seeks to have this Court overturn his conviction (effectively allowing his guilty plea to be withdrawn) on the basis that the charges against him should have been stayed for abuse of process. That contention makes it necessary for him to show that the stay in respect of his co-offenders was correct either on the basis that decision of the Court of Appeal in *Antonievic* was wrong or that Collins J was right in taking the view that additional evidence made the case distinguishable. The questions on which leave were granted were whether *Antonievic* was correctly decided and if not whether this warranted the quashing of the conviction.[143] The Crown contends that *Antonievic* was correctly decided.

[117] The case as it has developed is highly unusual in that neither *Antonievic* nor the stay judgment of Collins J in the High Court are directly before us. While it is necessary to consider whether *Antonievic* is correctly decided, because of the arguments for and against the appeal, on the view I take that *Antonievic* was wrongly decided it is not necessary for me to engage with the position taken by the majority that the matters of fact relied upon by Collins J to distinguish *Antonievic* did not justify the different result. I prefer not to do so because I think it unfortunate to review that decision, which the Crown did not appeal, in collateral proceedings where those affected by the ruling are not before the Court. I therefore do not join the judgment of the majority on the point, dealt with at paragraphs [81] to [95] of the reasons delivered by Arnold J.

[118] On the other hand, I agree that the very fact of the stay granted to the co-offenders, most of whom were charged with more serious offending than the appellant, is sufficient ground in the unusual circumstances of this case to allow the appeal and quash the convictions. Against the background of the stay granted to the co-accused, which has not been appealed by the Crown, I agree that there should be no order for retrial. I agree with the reasons for reaching this result given by Arnold J at [96] to [108].

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142 *R v Antonievic* [2015] NZHC 679 (Collins J s 347 applications).
143 *Wilson v R* [2015] NZSC 71.

Abuse of process

[119] Courts have inherent and implied powers to ensure that their processes are not abused.[144] There is a duty to exercise such powers where fair trial cannot be provided. An unfair trial in itself is an abuse of process and holding an unfair trial would breach s 25(a) of the New Zealand Bill of Rights Act 1990 which provides that the right to a fair trial is a "minimum standard of criminal procedure".

[120] A duty to prevent abuse of process arises also where there is no unfairness in the particular case but allowing the trial to proceed would be an affront to justice which would taint the criminal justice system.[145] This jurisdiction exists in recognition of the fact that some values in the legal system transcend the significance of any particular case, as Lord Morris pointed out in respect of the rules of natural justice in *Ridge v Baldwin*.[146]

[121] The standard of abuse on either basis is rightly pitched at a very high level. There is significant public interest in the prosecution of those suspected of criminal offending. To stay a prosecution is "an extreme step which is to be taken only in the clearest of cases".[147] The focus of the jurisdiction is not on past events in themselves but on whether proceeding with the trial would be an abuse of process either because the trial cannot be fair or because holding the trial would itself be an affront to justice because it undermines the legitimacy of the process.[148] Only fundamental error of process could give rise to irremediable unfairness in trial or could taint the criminal justice system. The jurisdiction to stay criminal prosecutions for abuse of process where trial fairness to the accused can be otherwise protected is therefore a residual jurisdiction exercised only when there is no other option. The defects which undermine the integrity of the trial must be radical. In deciding whether defects are

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144 *R v Hartley* [1978] 2 NZLR 199 (CA); *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA); *Fox v Attorney-General* [2002] 3 NZLR 62 (CA); *Jago v The District Court of New South Wales* (1989) 168 CLR 23; *Connelly v DPP* [1964] AC 1254 (HL); and *R v Horseferry Road Magistrates' Court; ex parte Bennett* [1994] 1 AC 42 (HL).

145 *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA) at 482 per Richardson J and at 476 per Woodhouse J.

146 *Ridge v Baldwin* [1964] AC 40 (HL) at 113–114.

147 *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [37] per McGrath J for the Court of Appeal.

148 *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 29–31; and *R v Latif* [1996] 1 WLR 104 (HL) at 112 per Lord Steyn, with whose judgment the other members of the House of Lords agreed.

"so gross, or so persistent, or so prejudicial, or so irremediable" as to justify stay "however strong the grounds for believing the defendant to be guilty",[149] the critical question is not the strength of the prosecution evidence or the weakness of the defence, but the effect of the defect on the legitimacy of the trial.[150]

[122] Because of the focus on the circumstances at the trial in prospect (whether it can be fairly conducted or whether holding it would be an abuse of process), I have reservations about whether questions of causality are as centre-stage as they were treated by the Court of Appeal in *Antonievic* and as they often are when considering questions of admissibility of evidence (where the fact that evidence would not have been obtained but for some official impropriety may be highly significant to its admissibility).[151] I do not read the judgments in *R v Maxwell* as suggesting otherwise.[152] The questions for the court when considering abuse of process are whether the trial can be fair or whether the criminal justice system would be tainted by its proceeding. That is a matter of bottom line judgment.

[123] The connection in the present case is in any event direct because the prosecution is based on the police operation which is said to be an affront to the criminal justice system. I do not think any elaboration of causation is warranted in that context. And I think the emphasis in the Court of Appeal on questions of "causation" (in reality in their reasoning causality between the misconduct and the obtaining of evidence) obscured in that Court the critical issue which was whether the trial could be legitimate given the serious irregularity.[153]

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149 *Randall v The Queen* [2002] UKPC 19, [2002] 1 WLR 2237 at [28] per Lord Bingham.

150 *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315 at [39] per Elias CJ with whom Glazebrook J agreed.

151 As to which see for example cases such as *R v Shaheed* [2002] 2 NZLR 377 (CA); *R v Edmonds* [2007] NZCA 557; and *R v Hennessey* [2009] NZCA 363.

152 *R v Maxwell* [2010] UKSC 48, [2011] 1 WLR 1837. In *Maxwell*, the first conviction had been obtained following serious police misconduct including perjured evidence. While in prison however, Maxwell had made a number of admissions of guilt voluntarily. It was argued on his behalf that he would not have done so but for the fact of his conviction on wrongfully obtained evidence. The discussion of "causation" arises in that context. The majority took the view that the presence of a "but for" linkage was no more than one of the relevant factors in the overall decision whether retrial would be an abuse. And although Lord Brown and Lord Collins in dissent thought the link strong enough to warrant stay, they did not greatly emphasise causal reasons.

153 *R v Antonievic* [2013] NZCA 483, [2013] 3 NZLR 806, in particular at [60]–[79] and [107]–[109].

Integrity of trial

[124] The present case does not give rise to concern about fair trial. Rather, it is one where it is said that to hold a trial at all would be an affront to justice because the process is irremediably tainted by the undercover police operation which led to the charges. In deciding whether there is such taint that it would be an affront to the system of criminal justice to proceed with the trial, it is necessary to stand back and make an overall assessment. General guidance may be misleading. Checklists containing commonly recurring factors and suggestions that they are to be assessed in a balance may obscure the absolute necessity for the decision-maker to reach the decision he or she believes to be right in the actual context.[154]

[125] Lord Dyson for the Judicial Committee in *Warren* cited the decision of the House of Lords in *R v Latif*[155] as authority for a "balancing approach"[156] when ascertaining abuse of process. This reference may be apt to mislead in the New Zealand context where admissibility of improperly obtained evidence is determined under an elaborate "balancing process" described in s 30 of the Evidence Act 2006. The balancing referred to in *Latif* by Lord Steyn (with whom the other members of the House of Lords agreed) had a narrower focus than the s 30 circumstances.

[126] The difference between staying a prosecution for abuse and "a determination of the forensic fairness of admitting evidence" was identified as a "point of principle" by Lord Nicholls in *R v Looseley*. He considered that "[d]ifferent tests are applicable to these two decisions".[157]

[127] In *Latif* the taint said to justify stay consisted of entrapment by customs officials of the appellant and the participation of a customs official in criminal offending. In considering the legal framework in which the issue of abuse of process

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154 As I suggested was illustrated by the decision-making in *Helu v Immigration and Protection Tribunal* [2015] NZSC 28 at [1], although there, at least, there was a statutory identification of relevant factors which is not the case here.

155 *R v Latif* [1996] 1 WLR 104 (HL).

156 *Warren v Attorney-General for Jersey* [2011] UKPC 10, [2012] 1 AC 22 at [25].

157 *R v Looseley* [2001] UKHL 53, [2001] 1 WLR 2060 at [18].

was to be considered, Lord Steyn referred to the dilemma of the courts in such cases:[158]

> If the court always refuses to stay such proceedings, the perception will be that the court condones criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice system and bring it into disrepute. On the other hand, if the court were always to stay proceedings in such cases, it would incur the reproach that it is failing to protect the public from serious crime. The weaknesses of both extreme positions leaves only one principled solution. The court has a discretion: it has to perform a balancing exercise. If the court concludes that a fair trial is not possible, it will stay the proceedings. That is not what the present case is concerned with. It is plain that a fair trial was possible and that such a trial took place. In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: *Reg. v. Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42. …
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> An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means.

[128] The balancing referred to by Lord Steyn is between two important public policies: the public interest in the prosecution of serious crime and the protection of the integrity of the criminal justice system. The need to strike a balance between these policies means the courts cannot be too fastidious, especially where the offending is serious. The salutary jurisdiction to stay proceedings is properly deployed only when the integrity of the criminal justice system would be compromised. That is the tipping point in the balance. It is a matter of judgment which does not depend on calculations such as in the much wider balancing of varied circumstances closely calibrated to the individual case when considering the admission of evidence.

[129] Inevitably, such judgment will turn principally on matters of degree and scale. So in *Latif* the House of Lords concluded that "the conduct of the customs

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[158] *R v Latif* [1996] 1 WLR 104 (HL) at 112–113.

officer was not so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed": "Realistically, any criminal behaviour of the customs officer was venial compared with that of [the appellant]".[159]

[130] There are statements in some of the authorities supportive of a balancing of commonly recurring factors, usefully collected by Professor Choo in *Abuse of Process and Judicial Stays of Criminal Proceedings*.[160] Those he identifies from the cases are the seriousness of violation of rights, whether official conduct is in bad faith or for improper motive, whether there were circumstances of urgency, the availability of other remedies, and the seriousness of the offence. It is clear that the author himself, however, prefers a "more robust approach".[161] He suggests that the dangers of guidelines or rules (ossification, rigidity in application) are best avoided by recognising that the principle of legitimacy behind stay for abuse of process requires stay where fundamental and unqualified rights are breached while permitting more finely textured assessment of the factors suggested in the cases (such as whether the violation is with improper motive or was undertaken in circumstances of urgency) where qualified rights are violated or there is no sufficient "causal" connection between the misconduct and the proceedings.[162]

Undercover operations

[131] Police participation in undercover operations entailing participation in criminal offending has not been treated as being in itself justification for rejection of evidence obtained in the absence of infringement of rights or unfairness to an accused, much less as being in itself an affront to justice warranting stay of a prosecution. Legislation providing immunity to police officers recognises that it may be necessary for officers to participate in criminal offending when acting undercover.[163]

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159 At 113.

160 Andrew Choo *Abuse of Process and Judicial Stays of Criminal Proceedings* (2nd ed, Oxford University Press, Oxford, 2008).

161 At 132.

162 At ch 6 and 7.

163 See, for example, Misuse of Drugs Act 1975, s 34A.

[132] When such conduct tips over into raising concerns about abuse may turn on questions of degree and scale. Abuse of process which taints the criminal justice process may arise if undercover operations entail actual violence, significant criminality on the part of police agents, or co-option of the courts into deception practised by the police. Stay in those circumstances may be necessary to "dissociate the justice system" from the conduct and maintain public confidence in it.[164]

[133] Beyond this general outline, I think it is not desirable to be more definite. As Lord Steyn pointed out, general guidance on how the jurisdiction is to be exercised is not useful when "an infinite variety of cases could arise".[165]

The matters implicating the integrity of the system

[134] In the present case, three steps taken by the police to bolster the credibility of the undercover officers who had infiltrated the Red Devils were said to justify stay of the prosecutions. They were the false charges brought against the male undercover officer on a dishonest complaint, the creation and execution on a third party of a false search warrant, and an approach made by the police to the then Chief Judge of the District Court to obtain "approval" for the management of the fictitious charges through the court, including by the use of the undercover name used by the officer in his staged "prosecution". In my view it is artificial to separate out these elements when considering the overall impact on criminal justice because they were part of the same operation with the same aim.

[135] The facts relating to these actions are set out in the reasons given by Arnold J and do not need to be repeated by me. It was acknowledged by counsel for the Crown that all entailed serious police misconduct.

[136] The false search warrant purported to be signed by a Deputy Registrar of the District Court, but in fact was forged by a police officer. The false prosecution of the undercover officer was based on an information known by the officer swearing it before a Registrar of the Court to be untrue. The information was withdrawn at the

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164 *R v Babos* 2014 SCC 16, [2014] 1 SCR 309 at [39] per Moldaver J for the Court.
165 *R v Latif* [1996] 1 WLR 104 (HL) at 113 discussed above at [127].

end of the police operation but not without further staged "scenarios" involving court appearances including for breach of conditions of bail.

[137] The steps taken to obtain "approval" from the Court for the officer appearing under a false name entailed two senior police officers attending on the Chief Judge of the District Court. They provided him with information about the operation and the enacted "scenario" in which, in order to divert suspicion from the agent and "enhance [the] agent's appearance of criminality", he had been arrested. A letter provided to the Chief Judge at the meeting advised him that the police were seeking "to facilitate the agent appearing in the local District Court under his assumed name" and indicated the charges to be laid against him. It explained that it was "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 letter described that "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 necessary".

[138] The officers gave evidence before Simon France J that they believed they had obtained the approval of the Chief Judge at the meeting to the course of action they proposed, although in the High Court and Court of Appeal the view was taken that this impression was likely to have been mistaken. In the High Court, Simon France J pointed out that the letter provided to the Chief Judge "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".[166] He considered that the Chief Judge and the police were not "on the same page".[167] The Chief Judge has since died so that his account of what happened is not known. The Courts below have pointed out that there is no evidence that the information conveyed was passed on by the Chief Judge to court staff or any Judge dealing with the subsequent appearances by the undercover officer.

[139] As Simon France J recognised in the High Court, the approach made to the Chief Judge was to obtain approval for use of charges and prosecutions "as an

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166 *R v Antonievic* [2012] NZHC 2686 (Simon France J stay judgment) at [35].
167 At [35].

investigative tool".[168] That was quite different from the more familiar situation where, occasionally, undercover police officers arrested with offenders following the commission of crimes are processed. Although Simon France J thought that there was "nothing in the letter that would have alerted the Judge to the fact that the present situation was the former and not the latter",[169] given that the scenario staging here was "essentially an unheard of event",[170] I think there was indeed indication in the letter that the court appearance was being staged for investigative purposes, although it may not have been sufficiently brought home to the Judge.

The High Court judgment

[140] Simon France J considered that there was serious abuse of process in the use made by the police investigation of the courts:[171]

> 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.

[141] The Judge pointed out that the actions of the police fell outside the provision made by Parliament in legislation to protect the identity of undercover officers and accordingly was without statutory authority in circumstance in which "legislative consideration has been given to what is permissible".[172] He assessed the seriousness of the offending as being "moderate".[173]

[142] Simon France J considered that there had been "significant" abuse of the court processes in that the court had been treated as "a convenient investigation aid".[174] The only matter that gave him pause in a "firm response"[175] was "the lack of any strong causal connection" between the conduct and the evidence obtained

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168 At [36].
169 At [36].
170 At [36].
171 At [46].
172 At [55].
173 At [59].
174 At [66].
175 At [66].

against the defendants.[176] He noted that in *Maxwell* the Judges in the majority had regarded causative connection as important, but thought such consideration was not decisive because "the concern is not unfairness to the accused, but the necessity to maintain the integrity of the court's processes".[177] In those circumstances he considered it was sufficient connection that the charge was the product of the police operation:[178]

> 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.

[143] Given the "serious misuse of the court" and "a troubling misunderstanding of its functions", Simon France J was of the view that "anything other than a significant response runs the risk of being seen as rhetoric".[179] The only appropriate response, he considered, was to grant a stay.

The judgment in the Court of Appeal

[144] On appeal by way of case stated, the Court of Appeal reversed the decision in the High Court. It considered that the stay should not have been granted. The Court of Appeal took the view that the Judge had asked himself the wrong question. Instead of looking to whether the proposed trial would be an abuse of the processes of the court, he had focussed only on whether "the impugned conduct" was an abuse of the process of the court.[180] The Court took the view that there was "no 'but for' element in this case" (referring to *Warren*) because the misconduct "did no more than help [the undercover officer] to maintain his cover" and was not essential to the completion of the operation: "While [the officer] will be giving evidence at trial, presumably some of it relating to events after the police misconduct, it cannot be said that but for the police misconduct, that evidence would not have been available".[181]

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176 At [69].
177 At [70] citing the discussion of Lord Kerr in *Warren v Attorney-General for Jersey* [2011] UKPC 10, [2012] 1 AC 22 at [81]–[85].
178 *R v Antonievic* [2012] NZHC 2686 (Simon France J stay judgment) at [70].
179 At [74].
180 *R v Antonievic* [2013] NZCA 483, [2013] 3 NZLR 806 at [102].
181 At [107]–[108].

[145] The Court of Appeal considered that the case was one, like *R v Grant*,[182] where "past misconduct by the police … had no real bearing on the trial":[183]

> We conclude that, although the police misconduct in the present case was grave and, itself, involved an abuse of the Court's process, the trial of the respondents would not involve the Court condoning that conduct and would not involve the Court accepting evidence obtained as a result of that misconduct.

[146] Although the Court acknowledged that the case was "finely balanced because of the seriousness of the police conduct", it considered that the balancing exercise favoured refusal of the stay "so that the respondents face trial for the offences of which they stand accused".[184]

Why stay was justified

[147] I am unable to agree with the approach and conclusion of the Court of Appeal. I consider it did not analyse the irregularity in what occurred accurately and that it failed to step back and look at the effect on the legitimacy of the trial in the round.

[148] In the first place, I do not think that the High Court approach was in error. In circumstances where Simon France J found that the court processes had been used as part of the police investigation, he considered that charges which were the product of the investigation had to be stayed "to maintain the integrity of the court's processes".[185] That does not strike me as a disciplinary approach to historic police conduct in the exercise of the stay jurisdiction. It was concerned with the "longer term effect" of what was necessary to restore "public confidence in the integrity of the system".[186] The Judge was also very conscious of the balance between "the unpalatable step of allowing persons accused of serious offences to avoid a trial" and protecting the integrity of the system.[187]

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182 *R v Grant* [2005] EWCA Crim 1089, [2006] QB 60.
183 *R v Antonievic* [2013] NZCA 483, [2013] 3 NZLR 806 at [109]–[110] and [115].
184 At [117].
185 *R v Antonievic* [2012] NZHC 2686 (Simon France J stay judgment) at [70].
186 At [70].
187 At [70].

[149] More importantly, I am of the view that the Court of Appeal approach was itself erroneous in equating the harm to the administration of justice with the admission at trial of evidence obtained as a result of the extended cover obtained by the undercover agent through the deception. That is to fail to observe the difference in principle referred to by Lord Nicholls in *R v Looseley* between staying a prosecution for abuse of the processes of the court and the forensic fairness of admitting evidence. The affront to justice in this case had nothing to do with matters of fairness in obtaining and admitting evidence. It lay in the co-option of the court into the investigation which gave rise to the charges.

[150] This is not a case comparable to *Grant*, where intercepted privileged conversations between an accused and his lawyer were not part of the prosecution case and were outside the court processes. In those circumstances a stay could be characterised as a backward-looking disciplinary exercise. Rather, in the present case, the court was drawn into providing the undercover investigation with additional cover. Such co-option of the court into the police investigation strikes at basic values in the criminal justice system.

[151] Minimum standards of criminal procedure under the New Zealand Bill of Rights Act include "the right to a fair and public hearing by an independent and impartial court".[188] The "Right to justice" recognised by s 27 is a right "to the observance of the principles of natural justice by any tribunal … which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law".[189]

[152] Both of these fundamental requirements were compromised by the actions of the police in calling on the Chief Judge informally outside the circumstances provided by legislation for ex parte process and without any of the safeguards. The requirements of independence and separation of the courts from the executive branch of government are wholly inconsistent with the use of a sham judicial process to further the police investigation which here gives rise to the potential trial. The fact that it is not shown that the information provided to the Chief Judge was shared with

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188 New Zealand Bill of Rights Act 1990, s 25(a).
189 Section 27(1).

judicial officers seized of the proceedings before the court does not correct matters. Nor do I think that it was for the appellant to discharge any evidential burden in that regard once a course so irregular had been taken.

[153] The appearance of impartiality in judicial function is critical for the maintenance of confidence in the administration of justice through the courts. What was implicated here was an unqualified "strong right",[190] the appearance of which was essential to the integrity of the system. That appearance was significantly compromised by the false warrant which was executed against a third party, by the false information and by the scenarios acted out in the court in respect of bail. Above all, the court itself was tainted by the informal approach for approval of the use of the court processes for the ends of the investigation. It is quite inexplicable how a meeting between the Chief Judge and the police on the subject of an ongoing police investigation likely to lead to court proceedings came to be held at all. The fact that it was in my view fully justified Simon France J in making the stay. What happened was inconsistent with minimum standards of criminal justice. To allow the trial to continue before a tribunal compromised in this way is a serious affront to the criminal justice system which required the exceptional course he took.

[154] Where a stay is "necessary to protect the integrity of the criminal justice system",[191] no further balancing of different objectives of the criminal justice system is appropriate. Nor is there any discretion in the matter. There is a "duty" to stay, as Lord Diplock made clear in *Hunter v Chief Constable of the West Midlands Police*.[192] For the reasons indicated at paragraph [119] to [130], I am unable to agree with the majority that the considerations identified at paragraphs [92] and [93] or close consideration of causality enter into "the balancing process" in determining whether the proposed trial would be an abuse of process. These considerations may be helpful in considering whether stay is warranted where the irregularity is not as radical (as where it involves a qualified right in respect of which some closer assessment of effect may be required) or when considering questions of admissibility of evidence. They cannot counter the reasons why to proceed with the trial here

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190 Andrew Ashworth *Human Rights, Serious Crime and Criminal Procedure* (Sweet & Maxwell, London, 2002) at 76.

191 *Warren v Attorney-General for Jersey* [2011] UKPC 10, [2012] 1 AC 22 at [83] per Lord Kerr.

192 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL) at 536.

would undermine the values of the criminal justice system and amount to abuse of process.

[155] Because I consider that the Court of Appeal was wrong in *Antonievic*, I would allow the appellant to vacate his plea of guilty. On the view I take it was an abuse for him to have been proceeded against at all. I would set aside the conviction and decline to order a retrial on the basis that to do so would be an abuse of process.

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