NOTE: COURT OF APPEAL ORDER PROHIBITING PUBLICATION OF CERTAIN MATTERS IN RELATION TO THE SENTENCE APPEAL PURSUANT TO S 205(1) OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 68/2024
[2024] NZSC 137

BETWEEN	SEIANA FAKAOSILEA Applicant
AND	THE KING Respondent

Court: Glazebrook, Ellen France and Miller JJ

Counsel: J J Rhodes and K E Tuialii for Applicant
B F Fenton for Respondent

Judgment: 9 October 2024

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Mr Fakaosilea was convicted of conspiring to import large quantities of methamphetamine. The Crown case against him included evidence from covert tracking devices placed in two vehicles which he used. These devices tracked the vehicles on a near-continuous basis over many months. The vehicle movements were relied on to show that the vehicles stopped at certain addresses at certain times, linking him (with other evidence) to his co-conspirators.

[2] The New Zealand Police | Ngā Pirihimana o Aotearoa initially disclosed reports of the tracking data which recorded all stops by the vehicles that exceeded two

minutes in duration. One week before the trial was scheduled to commence, after a query from defence counsel, the Police disclosed a report which recorded all stops of 30 seconds or more.

[3] During trial defence counsel raised further concerns about the data. Some of the addresses which Police software associated with the data had been shown to be in error. But counsel were also concerned that raw tracking data and the software used to analyse it had not been disclosed. They asked the trial Judge, Campbell J, to abort the trial. He declined to do so, after holding a voir dire to hear evidence from two police officers about the data and its disclosure.[1] He found, citing *Singh v R*, that the raw data was not "relevant information" for purposes of s 13(2) of the Criminal Disclosure Act 2008.[2] It was inconceivable that every such location, second-by-second over many months, could be relevant.

[4] The issue was one ground of Mr Fakaosilea's appeal against conviction, which the Court of Appeal dismissed.[3] The Court found that defence counsel had known before trial that not all of the raw data had been disclosed.[4] The Police had explained that to provide more detail would require more than 4,000 pages and their system crashed when attempts were made to generate such a report. They offered to supply more detail in relation to any specific dates. Defence counsel did not respond to the offer.

[5] The Court reasoned that the Crown case turned on the location of the vehicles on particular days.[5] Information relating to that must be disclosed, but disclosure of the entire data set was not required in this case. Defence counsel might request more disclosure under s 14 if they thought some other aspect of the data captured by the tracking devices was relevant. There was no evidence to suggest that the data was incorrect.[6]

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1 *R v Fakaosilea* [2022] NZHC 1937 (Campbell J) at [24].
2 At [19]. See *Singh v R* [2020] NZCA 629; and Criminal Disclosure Act 2008, ss 6(2) and 8.
3 *Fakaosilea v R* [2024] NZCA 218 (Courtney, Whata and Downs JJ).
4 At [107].
5 At [125].
6 At [126].

[6] The application for leave to appeal is advanced on the basis that the trial Judge was wrong to order that the Police need not disclose the raw data. Mr Rhodes, who was senior trial counsel for Mr Fakaosilea, argued that defence counsel did not understand that the Police's offer to provide specific information meant that no further attempt would be made to generate a full report. He contended that in the result there was inequality of arms because the Police could effectively watch the tracking devices moving in real time and defence counsel were not aware of any stops of less than 30 seconds. It was no answer that defence counsel might request more detail; they needed the raw data to identify any stops of significance and they needed to know that the data was accurate. *Singh* ought to have been distinguished on the grounds that the data in that case—text messages on the complainant's phone—raised privacy considerations not present here, and there was no issue as to the accuracy of those messages. He argued that there is a risk that the outcome of the trial was affected by the non-disclosure.

[7] The Crown responds that the disclosure process does not make the Police the sole gatekeepers. It requires that they make an assessment of relevance. If the defendant thinks that other information is relevant, they may ask for it. In this case there was no question of the defence being unaware of the existence and nature of the data; the parameters of the initial report and the second report were disclosed, and the offer was made to run more detailed reports on request. That was reasonable given the difficulty of generating a full data set. There was and still is no reason to think the additional data was relevant, or that the raw data was incorrect. Nor is there any reason to think that the data may have affected the outcome, which turned on intercepted communications. It is true that privacy interests were engaged in *Singh*, but the privacy dimension was ultimately incidental; the Court rested its decision on the question of relevance.[7] That question is heavily factual, and the Courts below both found that the raw tracking data was not relevant on the facts.

[8] We do not accept that this case raises a question of general or public importance about the interpretation of "relevant information" in s 13 of the Act, or any reason to think there has been a miscarriage of justice.[8] A prosecuting agency must begin the

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7 Citing *Singh*, above n 2, at [26]–[28].
8 Senior Courts Act 2016, s 74(2)(a)–(b).

disclosure process with the information which it understands to be relevant. That happened in this case. Defence counsel knew in good time before trial that the location data showed only stops of more than two minutes. If any other stops were thought relevant they could ask for the data for a given day or period. They did not ask for data showing stops of less than 30 seconds, presumably because the raw data was not thought relevant. There still is no reason to think that any such stop was relevant to the key events, which concerned conversations on two specific dates.

[9] The application for leave to appeal is dismissed.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent