IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA42/2020
[2024] NZCA 678

BETWEEN	BENJAMIN HARRY TIMMINS Appellant
AND	THE KING Respondent

Hearing:	1 October 2024
Court:	Collins, Brewer and Osborne JJ
Counsel:	Appellant in person S C Baker for Respondent V C Nisbet and S W O Campbell as counsel to assist the Court
Judgment:	18 December 2024 at 12 pm

JUDGMENT OF THE COURT

The appeal against conviction is allowed in part. The conviction for unlawful possession of ammunition is set aside. There is to be no retrial.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] Following a trial before Judge Spear and a jury in 2019, Mr Timmins was convicted in relation to three charges: cultivation of cannabis, unlawful possession of

ammunition and theft. He was sentenced to 11 months' home detention and ordered to pay reparation.[1] He now appeals his conviction.

[2] The charges arose from a police search of a property in Whanganui (the property) on 21 December 2016. The police found:

(a) a cannabis growing shed at the rear of the property which contained 58 cannabis plants;

(b) 204 rounds of ammunition and other items associated with guns in a bedroom; and

(c) a power meter that had been altered to prevent it correctly recording the amount of power that was used at the property.

[3] The grounds of appeal may be summarised in the following questions:

(a) Did Judge Roberts err when, in a pre-trial ruling, he determined that the evidence found at the property was admissible?[2]

(b) Did a miscarriage of justice arise through the police obtaining documents from various government agencies for the purposes of comparing Mr Timmins' handwriting with documents found at the property?

(c) Did Judge Spear cause a miscarriage of justice when he directed the jury on issues associated with the charge laid under the Arms Act 1983?

(d) Did Mr Waugh, Mr Timmins' trial counsel, cause a miscarriage of justice by failing to properly advise Mr Timmins about giving evidence or otherwise in presenting his defence?

---

1 *R v Timmins* [2019] NZDC 25927 [sentencing notes].
2 *R v Timmins* [2017] NZDC 22297 [pre-trial ruling].

Appeals against conviction

[4] Under s 232 of the Criminal Procedure 2011, we must allow the appeal if we are satisfied a miscarriage of justice has occurred for any reason.[3]

[5] A "miscarriage of justice":[4]

> … means any error, irregularity, or occurrence in or in relation to or affecting the trial that—
>
> (a) has created a real risk that the outcome of the trial was affected; or
>
> (b) has resulted in an unfair trial or a trial was a nullity.

Representation

[6] As we have just noted, Mr Waugh represented Mr Timmins at his trial. Mr Timmins did not have counsel in relation to the pre-trial hearing concerning the admissibility of the evidence mentioned above at [3(a)]. Following his conviction, Mr Timmins terminated his instructions to Mr Waugh. This Court became concerned about the extraordinary delays that were occurring in having Mr Timmins' appeal heard and determined.[5] The Court therefore appointed Mr Nisbet to be counsel to assist the Court to ensure that any tenable grounds of appeal available to Mr Timmins were properly presented to the Court. We are grateful to Mr Nisbet for his helpful submissions.

Pre-trial ruling

Application for search warrant

[7] Prior to 21 December 2016, Constable Skates applied to an issuing officer for a warrant to search the property. The application was supported by a confidential report concerning information given by an informant to the police. The information in question was that firearms were at the property. Constable Skate did not prepare

---

3 Criminal Procedure Act 2011, s 232(2)(c).

4 Section 232(4).

5 Mr Timmins was convicted on 7 November 2019 and sentenced on 19 December 2019. His notice of appeal against conviction was filed in this Court on 30 January 2020. The original fixture was for May 2020 and was adjourned multiple times until this appeal hearing.

the confidential report. Nor did he know the identity of the informant. Another officer who was the informant's "handler" prepared the confidential report.

[8] The informant had only recently been registered as a police informant, but he had previously provided four reports that resulted in the arrest of persons in relation to firearms offences.

[9] Omitted from the search warrant application was any reference to the informant having two convictions for dishonesty, one of which involved him supplying false details to a police officer in relation to a driving matter. In addition, the informant had been granted diversion in respect of two charges of theft.

[10] The application for the search warrant also erroneously said that Mr Uriah Ponga resided at the property. The police informed the issuing officer that Mr Ponga was "associated to the Tribesmen Motorcycle Club" and had 29 previous convictions.

Execution of the search warrant

[11] Police executed the search warrant at about 7.45 am on 21 December 2016 with the assistance of the Armed Offenders Squad. No one was present at the address.

[12] At some point, the police searching the property telephoned Mr Timmins, who told them where keys to various rooms and sheds were located.

[13] At the rear of the property, police found a 21 m^2 shed that had been lined with reflective foil and fitted with growing lights and an irrigation system. As we have noted, 58 cannabis plants were found growing in the shed. A document was found in the shed which was computer generated information about how to grow cannabis clones.

[14] When police examined the power metre, they found that a hole had been drilled through the persplex cover of the meter and a pin inserted into the meter, which stopped the rotating dial from moving. The effect of blocking the rotating dial was

that the meter was not recording the amount of power being used and thus no power charges were incurred at the property.

[15] The police found in a bedroom of the property 204 rounds of ammunition, three firearm magazines, a silencer and a rifle bolt.

[16] The following items linked to Mr Timmins were seized by police from the property:

(a) his passport;

(b) a prescription in his name with the address of the property on the prescription;

(c) bills from Genesis Energy addressed to Mr Timmins at the address of the property; and

(d) handwritten documents in the growing shed which the Crown later submitted were likely written by Mr Timmins.

[17] At the trial, the Crown relied on the fact Mr Timmins had made a complaint to the police concerning a burglary and theft of some of his possessions from the property. This occurred several months before the search of the property. The Crown contended that if Mr Timmins made a police complaint, he would have checked the property to determine what was taken and would therefore have knowledge about the items on his property.

[18] Mr Timmins was spoken to by police but declined to make any statement. He was then arrested and charged with the offences we specified at [1].

District Court judgment

[19] The Crown applied under s 101 of the Criminal Procedure Act for a ruling that the items seized by the police were admissible as evidence. That application was

determined by Judge Roberts on 29 September 2017.[6] At the time, Mr Timmins was acting for himself.

[20] When ruling the items seized from the property admissible, Judge Roberts:

(a) Explained the reference to Mr Ponga in the search warrant application was a mistake as Mr Ponga was associated with another address on the same street as the property. The police provided evidence as to how the mistake occurred.[7]

(b) The unredacted confidential information from the informant laid a solid foundation for issuing a search warrant. The Judge said:

> [18] … The informant['s] information, stand[ing] alone, would have justified the issuing officer granting the application. It stands to reason the evidence obtained from the warrant is not improperly obtained and is thus admissible.

(c) The Judge proceeded to add that even if the evidence was obtained improperly, it would nevertheless have been admissible under s 30 of the Evidence Act 2006.[8]

The trial

[21] At the trial, the Crown relied on the evidence obtained when executing the search warrant and other matters we have referred to at [16] and [17].

[22] The Crown also adduced evidence from a handwriting expert employed by the police. The expert compared the handwriting on pages found in the growing shed with samples of Mr Timmins' handwriting obtained from government agencies when he applied for a passport, a firearms license, a drivers license and some documents he submitted to Work and Income New Zealand (WINZ). The expert said there were "a number of gross and subtle similarities between the question[ed] handwriting and the specimens attributed to Mr Timmins". The expert said the forms obtained from

---

6 Pre-trial ruling, above n 2.
7 At [5]–[8].
8 At [19]–[20].

government agencies and the handwritten notes found in the growing shed were likely to have been written by the same person.

[23] Towards the end of the Crown case, Mr Waugh, who was at this stage acting for Mr Timmins, produced through the officer in charge of the case the certificate of title to the property.

[24] The certificate of title showed the property was transferred to a relative of Mr Timmins in 2005. In 2015, after the relative died, the property was transferred to Mr Timmins as executor of the deceased relative's estate. On 18 November 2015, the property was transferred to Mr Timmins in his personal capacity. On the same day, the property was transferred to a Ms Johnston. On 8 December 2015, Mr Timmins registered against the title a notice of claim of interest in the property pursuant to the Property (Relationships) Act 1976. That notice of claim was withdrawn in May 2017.

[25] The Crown called evidence from an employee of Genesis Energy concerning the way the energy metre at the property had been altered and the value of the electricity that was allegedly stolen.

[26] Mr Timmins elected not to give evidence, but instead called Ms Whānau as a witness. She said she had stayed at the property "off and on" between July and November 2016 and that other people were also staying at the property, including Mr Timmins' brother.

[27] In his summing up, when addressing the charge of possession of ammunition, the Judge told the jury:

> [27] The second element is this, has the Crown left you sure on the evidence that the defendant was in occupation of [the property] on that day, 21 December 2016. The law provides that every person who is in occupation on any land or building in which ammunition is found, is deemed to be in possession of that ammunition unless that person proves that the ammunition was not his property and that it was the property of another person. This is what I say is that in some cases there is a change to the standard approach that the Crown must prove the charge and each element of it.
>
> [28] In this case, if the Crown proves that the defendant was an occupier of that property, was in occupation of it at that time, then the law says that he is deemed as a matter of law to be in possession of the ammunition unless he

> persuades the Court that it was not his property and that it belonged to another person.
>
> [29] Now, we have heard no evidence at all about the property belonging to anybody else and so we do not have to go [past] that, just have to consider whether the defendant was in occupation of that property … on the day in question.
>
> [30] The law allows for more than one person to be in occupation of the land or buildings and obviously, at your home, even though you are sitting here in this courtroom, you are still in occupation of that property. You are the occupier of the property in occupation of it. You do not have to be there to be in occupation. You can be in Timbuktu and still be in occupation of your home. You are the person, as I have set out in the next point, to be in occupation does not mean that the person is there all the time, just that the person has the right to use the property and that is sufficient to establish the person is in occupation.
>
> [31] So, if you find that the defendant was in occupation of [the property], then you must do so to the standard of beyond reasonable doubt. As there is no evidence that the ammunition did not belong to him and that it was the property of another, the defendant is at law deemed to be in possession of it.
>
> [32] So charge 2 comes down simply to this, do you find, are you left sure that the defendant was in occupation of [the property] on 21 December 2016 and if you do not get to that point, you find him not guilty. If you do, he is guilty.
>
> [33] Now, there was also, you might see in the charge, if you look at the charge list, "[e]xcept for some lawful, proper and sufficient purpose." You do not have to be concerned with that because no one is setting up a suggestion here that that is so. It is not an element in this case that the Crown has to disprove. You do not have to be concerned with that. The only issue for charge 2 is are you left sure that he was in occupation of that property on that day. If so, he is guilty of charge 2. If not, not guilty.

[28] Mr Timmins's trial concluded on 7 November 2019, when guilty verdicts were returned on all charges.

First ground of appeal: were the seized items inadmissible?

[29] In his comprehensive submissions, Mr Nisbet contended that the search warrant application breached the fundamental requirement of candour required of those seeking a search warrant.

[30] The duty of candour on applicants for a search warrant was reaffirmed by the Supreme Court in *R v Reti*.[9]

> [39] The principal purpose of the information the applicant (the enforcement officer) provides in support of the application is to describe the existence of primary facts which satisfy the conditions for issue of the order, not to suggest the conclusions to be drawn from those facts. It follows from this, and also by necessary implication from the statutory scheme, that the applicant should provide the issuing officer with all information that could reasonably be regarded as relevant to the decision the issuing officer must make (which is whether the grounds for issue are made out) and not a selective or incomplete version of the facts.
>
> [40] The requirement of full disclosure of relevant information follows also from the fact that production orders, like search warrants, are almost invariably sought and obtained without notice to others affected by the order, and in particular without notice to the target of the order. The without notice nature of the procedure imposes an obligation on the applicant to "make full and candid disclosure of all facts and circumstances relevant to the question whether the warrant should be issued". The applicant is obliged to set out in the evidence supporting the application "all matters known to the applicant which might be relied on by the target of the warrant if that person had the opportunity to appear in opposition". On the other hand it is also the case that the police "cannot be expected to refer to every single piece of evidence available to them when seeking a search warrant".
>
> [41] A failure to make full and candid disclosure in an application for a production order or warrant may result in the order or warrant being invalid.

[31] Mr Nisbet submitted that where an application for a search warrant relies primarily on information from an informant, it is imperative that the applicant supply the issuing officer with "all information relevant to the informant's reliability". This includes supplying information relating to an informant's history of dishonesty.

[32] Detective Senior Sergeant Dye oversees the police registered informant programme. He gave evidence before us and was cross-examined about the apparent failure in this case to inform the issuing officer of the informant's convictions for dishonesty and supplying false details to a police officer. Detective Senior Sergeant Dye was also cross-examined about the error in the application which said Mr Ponga, the likely target, lived at the property when in fact he had no connection with the property at all.

---

9 *R v Reti* [2020] NZSC 16, [2020] 1 NZLR 108 per Winkelmann CJ, O'Regan and Williams JJ (footnotes omitted). See also *R v Mccoll* (1999) 17 CRNZ 136 (CA); and *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 (CA).

[33] Although he could not speak about the details of the application for the search warrant in this case, Detective Senior Sargent Dye said he would be concerned if the issuing officer had been "provided with a whole lot of false information and [p]olice knowingly did that".

Analysis

[34] Judge Roberts was not asked to consider the duty of candour principle. His decision on the admissibility of the evidence was based on the apparent strength of the informant's information which was provided to the issuing officer. But, the issuing officer was not told of the informant's record of dishonesty and in particular was not told of the informant's conviction for providing false information to the police.

[35] It is not the case that the duty of candour requires the police, on every occasion a search warrant is sought, to disclose an informant's criminal history. Many, if not most, informants will have a criminal history. But that goes to their character and not necessarily their reliability as an informant. Generally, it is the informant's history of reliably reporting criminal conduct, corroborated in the instant case by information independently available to the police, that will be significant. But, where convictions for dishonesty, particularly convictions for undermining the course of justice, would likely influence the issuing officer's assessment of the informant's reliability then the duty of candour requires them to be disclosed. In this case, the informant had a relatively recent history as an informant. The issuing officer should have been told about his history of dishonesty, and particularly his conviction for providing police with false details.

[36] Judge Roberts was satisfied the erroneous information in the application about Mr Ponga was an inadvertent mistake that had been properly explained by the police.[10] We accept that finding, but it is a source of concern to us that the application in this case was materially deficient in two respects: namely, the failure to disclose the informant's relevant criminal history and the misleading information that the likely target of the application resided at the property.

---

[10] Pre-trial ruling, above n 2, at [6]–[8].

[37] Unlike Judge Roberts, we think the errors in the application were significant and had those matters been properly drawn to the attention of a diligent and objective issuing officer, he or she may not have issued the search warrant.

[38] Even if the search warrant was defective, thereby causing the evidence to have been obtained improperly, it may still have been admissible under s 30 of the Evidence Act.

[39] For these reasons, we cannot, on the basis of the information before us, determine if this particular error was an oversight or a deliberate strategy on behalf of those who provided the applicant with information about the informant's reliability. What we can say is that the issuing officer should have been informed of the informant's relevant criminal record.

[40] The relevant parts of s 30 of the Evidence Act state:[11]

> **30 Improperly obtained evidence**
>
> (1) This section applies to a criminal proceeding in which the prosecution offers or proposes to offer evidence if—
>
> (a) the defendant or, if applicable, a co-defendant against whom the evidence is offered raises, on the basis of an evidential foundation, the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue; or
>
> …
>
> (2) The Judge must—
>
> (a) find, on the balance of probabilities, whether or not the evidence was improperly obtained; and
>
> (b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system of justice.
>
> (3) For the purposes of subsection (2), the court may, among any other matters, have regard to the following:

[11] Emphasis in original.

(a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:

(b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:

(c) the nature and quality of the improperly obtained evidence:

(d) the seriousness of the offence with which the defendant is charged:

(e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:

(f) whether there are alternative remedies to exclusion of the evidence that can adequately provide redress to the defendant:

(g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others:

(h) whether there was any urgency in obtaining the improperly obtained evidence.

(4) The Judge must exclude any improperly obtained evidence if, in accordance with subsection (2), the Judge determines that its exclusion is proportionate to the impropriety.

(5) For the purposes of this section, evidence is **improperly obtained** if it is obtained—

(a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies; or

…

(c) unfairly.

(6) Without limiting subsection (5)(c), in deciding whether a statement obtained by a member of the Police has been obtained unfairly for the purposes of that provision, the Judge must take into account guidelines set out in practice notes on that subject issued by the Chief Justice.

[41] Thus, s 30 of the Evidence Act sets out the sequential steps required to determine whether or not evidence has been improperly obtained, and if it has been improperly obtained, whether or not it is nevertheless admissible. It is a two-step process:

(a) First, the Judge is required to determine on the balance of probabilities whether or not the evidence was improperly obtained.

(b) Secondly, if the evidence was improperly obtained, the Judge would then undertake a balancing exercise to determine whether or not excluding the evidence was proportionate to the impropriety. The balancing exercise undertaken at this stage requires appropriate weight to be given to the impropriety and for a proper account to be taken of the need for an effective and credible system of justice. The matters set out in subs (3) may be relevant to the balancing exercise undertaken pursuant to subs (2)(b).

[42] In undertaking the balancing exercise, we shall examine the relevant factors in s 30(3) of the Evidence Act.

Importance of the right that was breached

[43] When we assess the importance of the right breached and the seriousness of the breach, we conclude that unlawful search of a person's property is a serious breach of their right under s 21 of the New Zealand Bill of Rights Act 1990 (NZBORA) not to be subjected to unreasonable search and seizure of their property.

[44] This point was affirmed in the following way in *F v R*:[12]

> [23] A person's home has long been recognised by the law as a special place where a person's fundamental right to privacy is protected from unauthorised interference. The right to the protection of the law from "arbitrary interference" with a person's home is enshrined in art 12 of the United Nations Declaration of Human Rights, art 17 of the International Covenant on Civil and Political Rights and in New Zealand implicitly in s 21 of the New Zealand Bill of Rights Act 1990 (NZBORA) which provides that everyone has the right to be secure against "unreasonable" search or seizure of their property.

This consideration weighs in favour of excluding the evidence.

---

12 *F v R* [2014] NZCA 313 (footnotes omitted).

The nature of the impropriety.

[45] As we have noted, it is very difficult for us to reach any conclusions about the nature of the impropriety and in particular whether the failure to disclose the information relating to the informant's criminal history was deliberate, reckless or done in bad faith. We accept that the references in the application to Mr Ponga were an inadvertent error.

Nature of the evidence obtained

[46] When we consider the nature and quality of the improperly obtained evidence, it is very clear that the items obtained from the property were significant and ultimately resulted in the charges against Mr Timmins being proven. This consideration weighs in favour of admitting the evidence.

Seriousness of the offence

[47] The cannabis cultivation offending was moderately serious. We place more significance on the seriousness of the Arms Act offending, particularly given the number of rounds of ammunition found in the property. This factor weighs in favour of admitting the evidence.

Other investigatory techniques

[48] There are no other investigatory techniques not involving any breach of rights that were known to be available but were not used. This factor also weighs in favour of admitting the evidence.

Alternative remedy

[49] There is no alternative remedy to excluding the evidence that could adequately provide redress to Mr Timmins.

Risk of physical harm

[50] The impropriety was not necessary to avoid apprehended physical danger to police or others. This factor weighs towards excluding the evidence.

Urgency

[51] We accept there was some urgency involved in searching for weapons at the property based on the information provided by the informant. This factor weighs in favour of admitting the evidence.

Conclusion

[52] Ultimately, we have decided, albeit by a very fine margin, that excluding the evidence would be a disproportionate response to the way the evidence seized from the property was improperly obtained. In reaching this conclusion, we have given weight to the impropriety and for proper account to be taken of the need for an effective and credible system of justice. We add that had there been evidence the police deliberately failed to inform the issuing officer about the informant's relevant criminal history, we would have reached a different conclusion.

[53] We accordingly conclude, albeit for different reasons to those given by Judge Roberts, that the right conclusion was reached in the pre-trial ruling concerning the admissibility of the items seized from the property.

Second ground of appeal: were the documents obtained from Government agencies inadmissible?

[54] As we have explained, during the search of the property police seized handwritten notes from the growing shed. Those documents were examined by a police document examiner who compared the hand writing with that on documents Mr Timmins had submitted to various Government agencies.

[55] The documents obtained from other government agencies included three documents from WINZ:

(a) A transition to work application dated 6 July 2015.

(b) A WINZ job seeker support application dated 22 December 2015.

(c) A WINZ training incentive allowance application. The date is not legible.

[56] These documents were sent by WINZ to Detective Gray, the officer in charge of the case, after he asked WINZ if they had any documents relating to Mr Timmins. WINZ appears to have forwarded the documents to Detective Gray without the police having to obtain a production order.

[57] Police also obtained the following documents without apparently seeking a production order.

(a) A New Zealand Transport Agency application form dated 11 October 2017.

(b) A Department of Internal Affairs passport application form dated 8 February 2014.

[58] Police retrieved from their own files a firearms application form signed by Mr Timmins dated 30 April 1993.

[59] Mr Nisbet submitted that the way the police went about obtaining these documents breached principles 2 and 11 of the Privacy Principles set out in s 6 the Privacy Act 1993.[13] Principle 2 provides that agencies should collect personal information directly from the individual concerned and principle 11 places limits on the disclosure of personal information. That submission was based on the contention that by obtaining the documents in question without a production order, police breached Mr Timmins reasonable expectation of privacy.

[60] In *R v Alsford*, a majority of the Supreme Court explained that whether a police request for information from a third party constitutes a "search" will depend on whether it relates to personal information in respect of which there is a reasonable

[13] These principles are now found in s 22 of the Privacy Act 2020.

expectation of privacy.[14] Factors that could influence the assessment of a reasonable expectation of privacy include:[15]

> (a) the nature of the information at issue;
>
> (b) the nature of the relationship between the party releasing the information and the party claiming confidentiality in the information;
>
> (c) the place where the information was obtained; and
>
> (d) the manner in which the information was obtained.

[61] Different considerations apply to each of the documents obtained by the police.

[62] In respect of the firearms application, we doubt there could be any reasonable expectation that the contents of that form were private. The form is a police document which the police store in their files. Importantly, the document does not contain sensitive or particularly personal information that would engage Mr Timmins right to privacy.

[63] Similarly, the passport application and the form obtained from the New Zealand Transport Agency, do not contain sensitive personal information that would engage a reasonable expectation of privacy.

[64] The documents obtained from WINZ however contain information about Mr Timmins financial position and his personal relationships.

[65] We are satisfied the documents obtained from WINZ engaged a reasonable expectation of privacy for the following reasons:

(a) The nature of the information in the WINZ forms was, as we have explained, personal and sensitive.

(b) The relationship between WINZ and Mr Timmins. A reasonable and objective person would consider that personal information held by

---

[14] *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 at [64] per William Young, Glazebrook, Arnold and O'Regan JJ.

[15] At [63] per William Young, Glazebrook, Arnold and O'Regan JJ.

WINZ about a client would not be handed to the police without a production order.

(c) Closely aligned with the last point is the way the information was obtained by the police. It appears the WINZ documents were simply handed over in response to a request as to whether or not WINZ had documents relating to Mr Timmins. The approach taken by WINZ displayed no regard to Mr Timmins' right to privacy.

[66] We are satisfied that the way the police obtained the WINZ documents involved impropriety on the part of WINZ. We do not however think that there was impropriety on the part of Detective Gray who merely asked WINZ if they had any documents relating to Mr Timmins.

[67] Even if the WINZ documents were improperly obtained by police, we would hold that those documents were nevertheless admissible under s 30 of the Evidence Act.

[68] In reaching this conclusion we fully accept the importance of the right to privacy which is essential to human dignity and individual autonomy.

[69] We also accept there was no urgency in obtaining the WINZ documents.

[70] It is clear however that to the extent there was any impropriety on the part of the police, it was far from deliberate, reckless, or done in bad faith.

[71] The seriousness of the offending is another factor that weighs in favour of ruling that the documents in issue were admissible. An additional factor is the fact that the documents helped identify Mr Timmins as likely being the author of the handwritten notes found in the growing shed.

[72] We are therefore satisfied that the documents obtained by police for the purposes of comparing Mr Timmins's handwriting with the notes found in the growing shed were properly admitted at his trial.

[73] Accordingly, the second ground of appeal fails.

Third ground of appeal: Did the Judge err in directing on the Arms Act charges, causing a miscarriage of justice?

[74] As we have noted, the Crown's case at trial was that Mr Timmins was "in occupation" of the property. The consequence of establishing this was that Mr Timmins was "deemed" to be in possession of the ammunition found at the property.[16]

[75] Even though Mr Timmins was found to be "in occupation", he could still defend the charge if he could prove the ammunition was not his and was in the possession of someone else.[17] The standard of proof placed upon Mr Timmins in these circumstances was on the balance of probabilities.[18]

[76] As we have noted, Mr Timmins called one witness, namely Ms Whānau, who had been living at the address and who outlined how various people would come and go from the property in the months prior to the police search of the property. She also said Mr Timmins was absent from the property for periods during the times she was there.

[77] In *R v Coultas*, this Court said the following about "occupation" as that concept is used in s 66 of the Arms Act:[19]

> [15] … The term "occupation" is not defined in the Act. Juries are simply asked to utilise their commonsense and experience of life in considering whether an accused person is relevantly in occupation of any land or building.
>
> [16] In *R v McKeown* … this Court said:
>
> > The Arms Act does not define "occupation" and we see no occasion for the Court to impose its own definition when situations can vary greatly. When a [j]udge or jury, as the case may be, is considering whether an accused was in occupation of any land or building, a commonsense not a legalistic approach is called for. The extent of his physical presence and the degree of

---

16 Arms Act 1983, s 66.

17 Section 66.

18 *R v Wickliffe* [2009] NZCA 504 at [25] and [29], citing *R v McKeown* (1988) 3 CRNZ 438 (CA) at 443; and *Heemi v R* [2018] NZCA 359 at [12] and [16], citing *Hooper v Police* HC Christchurch AP253/93, 22 July 1993 at 4.

19 *R v Coultas* [2009] NZCA 71 (citation omitted).

> his use of the particular land or building at the relevant time would be important factors in determining whether it could fairly be said that he was in occupation thereof. The lesser the extent of occupation by way of presence or use of the land or building, the more readily should an accused be able to discharge the onus to rebut on a balance of probabilities the presumption of his possession of any weapon found on that land or building[.]
>
> [17] It is not necessary that the accused be in exclusive occupation, nor that the Crown establish legal control over the premises on the part of an accused person, in the sense that he or she is either an owner or a tenant. A trespasser or squatter may be in occupation of premises without any right of occupation: see generally *McKeown* at 441.
>
> [18] Within these broad parameters the Crown must establish beyond reasonable doubt that an accused person is in occupation. If it can do that, and establish also that firearms or explosives were found in the building concerned, then it is entitled to invoke the reverse onus of proof. At that point an accused person will be convicted unless he or she can show on the balance of probabilities that the items were not his or her property and that they were in the possession of some other person.

[78] In his summing up, Judge Spear directed the jury that Mr Timmins was required to persuade the jury that the ammunition was not his or in his possession. The Judge omitted to explain that the onus on Mr Timmins when attempting to discharge the reverse onus was merely on the balance of probabilities.

[79] Even more concerning was the way the Judge decided to remove the defence from consideration by the jury and delete it from the question trail.

[80] Although Mr Timmins did not give evidence, Ms Whānau's evidence provided a foundation for Mr Timmins to be able to argue that the ammunition could have been owned by others who were living in the property in the period leading up to the execution of the search warrant. Unfortunately, the jury were instructed they could not consider this possible defence.

[81] Removing a possible defence from the jury's consideration constituted an error or irregularity within the meaning of s 232(4) of the Criminal Procedure Act. This in turn caused a miscarriage because an available defence was unfairly removed from consideration by the jury.

[82] We therefore allow the third of ground appeal and quash Mr Timmins conviction for having unlawful possession of ammunition. There is no point in ordering a retrial because of the antiquity of this case and because Mr Timmins has served his sentence.[20] There is to be no retrial.

Fourth ground of appeal: did trial counsel error occasion a miscarriage of justice?

[83] We have examined Mr Waugh's opening and closing addresses and his cross-examination of Crown witnesses at the trial. We have also had the advantage of observing Mr Waugh give evidence before us.

[84] Mr Waugh advised Mr Timmins in a letter before trial that if Mr Timmins was established to be an occupier of the property, he would have to prove the ammunition was not in his possession. Unfortunately, it does not appear Mr Timmins gave signed instructions to Mr Waugh when he elected not to give evidence, although we accept that Mr Waugh did discuss this topic with Mr Timmins.

[85] In any event, we have found that a miscarriage of justice arose through how the Judge instructed the jury in relation to the Arms Act charge. Any criticisms of the way Mr Waugh dealt with that charge are irrelevant.

[86] We are satisfied that Mr Waugh acted for Mr Timmins in a responsible and professional manner. No miscarriage arose through counsel's conduct.

Result

[87] The appeal against conviction is allowed in part. The conviction for unlawful possession of ammunition is quashed. There is to be no retrial.

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

---

[20] See for example *Witehara v R* [2016] NZCA 123 at [38]; *Redmam v R* [2013] NZCA 672 at [58]; *R v Kino and Mete* [1997] 3 NZLR 24 (CA) at 29; and Mathew Downs (ed) *Adams on Criminal Law – Criminal Procedure* (online looseleaf ed, Thomson Reuters) at [CPA233.02].