IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA525/2021
[2023] NZCA 163

BETWEEN	MAHIA TAMIEFUNA Appellant
AND	THE KING Respondent

Hearing: 10 February 2022 (further submissions on 10 March)

Court: Cooper, Brown and Goddard JJ

Counsel: S J Gray for Appellant
C A Brook and A G Becroft for Respondent

Judgment: 9 May 2023 at 11.00 am

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The application to extend the time for bringing the sentence appeal is granted.

C The sentence appeal is allowed to the extent that the order made pursuant to s 86C(4)(a) of the Sentencing Act 2002 is set aside. The sentence of four years and 11 months' imprisonment remains in place.

REASONS OF THE COURT

(Given by Cooper J)

Table of Contents

Introduction

[1] Following his trial at the High Court in Auckland the appellant, Mahia Tamiefuna, was convicted on one charge of aggravated robbery.[1] In circumstances that we explain below, the trial took place before Davison J, sitting without a jury.

[2] Mr Tamiefuna was sentenced on 22 October 2021 to a term of imprisonment of four years and 11 months, which he was ordered to serve without parole.[2] He now appeals against both his conviction and sentence.

The offending

[3] On the morning of 2 November 2019, a robbery occurred at a residential property situated in Swanson in West Auckland. The Crown case was that Mr Tamiefuna and another person, Manawanui Te Pou, arrived at the property shortly after 6 am. They drove onto the property in a red Ford Falcon. A blue Ford Falcon with silver roof racks arrived at the same time and remained parked on the road outside

---

1 *R v Tamiefuna* [2021] NZHC 1969 [High Court conviction judgment].
2 *R v Tamiefuna* [2021] NZHC 2880 [High Court sentencing notes] at [52].

the property. There was evidence that the occupants of the two vehicles were acting together: one of the men who had arrived in the red car retrieved an item of clothing from the blue car.

[4] The Crown alleged that Mr Tamiefuna and Mr Te Pou gained access to the house through a kitchen window. After searching an unoccupied bedroom, they entered a room where the complainant, Mr Lim, was sleeping. They woke him up, demanding that he hand over various items including the keys to his car. In the course of these events Mr Lim was struck by one of the offenders with an open hand.

Subsequent events

[5] After leaving the house with Mr Lim's car keys, phone and digital camera the two drove away. Mr Te Pou drove the red Ford Falcon, and Mr Tamiefuna drove Mr Lim's vehicle, a white Hyundai Santa Fe. The Crown was in a position to allege some of the details of the offending, including the arrival of the red Ford Falcon and movements of the two offenders on the driveway, because there was a high definition CCTV camera in operation at the front of a neighbouring property. The Crown claimed that Mr Te Pou was clearly identifiable in the footage obtained from the CCTV camera. But the face of the man said to be Mr Tamiefuna was obscured by a cap that he was wearing.[3] The man was wearing a black cap with a white marking, black and white Asics shoes, beige pants with cuffs and grey gloves.

[6] Some hours later Mr Te Pou was captured on CCTV at a petrol station. He had arrived there in a black Honda Odyssey vehicle together with a man wearing a sleeveless maroon vest, a black cap with white marking on it, a pair of black and white shoes, beige pants with cuffs and a single grey glove. The man could be seen associating with the occupants of a blue Ford Falcon with silver roof racks.

[7] The Crown alleged that the blue Ford Falcon was the same one that had been at Mr Lim's house at the time of the robbery. The Crown also claimed that the man

---

[3] We note that subsequent to the hearing of this case, Mr Te Pou was discharged under s 147 of the Criminal Procedure Act 2011: see *R v Te Pou* [2022] NZHC 2731. The High Court found that there was insufficient evidence of Mr Te Pou's involvement in the robbery for the case against him to be proved beyond reasonable doubt: at [10]. The High Court noted that Mr Tamiefuna had pleaded guilty to his part in the robbery. That was incorrect: Mr Tamiefuna pleaded not guilty.

accompanying Mr Te Pou was his co-offender in the robbery. In the service station footage, the registration number of the blue Ford Falcon could be seen.

[8] Subsequently, on 5 November 2019, Mr Tamiefuna was a passenger in a blue Ford Falcon with the same registration number as the vehicle captured in the service station footage. At about 4.20 am, Detective Sergeant Bunting (DS Bunting) conducted a random stop of the vehicle to check compliance with the Land Transport Act 1998 and obtain details of the driver and registered owner of the vehicle.[4] As a result of enquiries then made, DS Bunting learnt that the driver of the car was unlicensed and consequently impounded the car. When asked, Mr Tamiefuna and another passenger gave their names and details to DS Bunting who then searched for them in the Police National Intelligence Application (NIA). DS Bunting learnt as a consequence that all three occupants of the vehicle had convictions for property offending, and that Mr Tamiefuna had recently been released from prison on parole.

[9] DS Bunting had observed some items of property in the car. There was a women's handbag and jacket alongside four car batteries. The detective decided to create an "intelligence noting" in the NIA, recording the details of the three men and the fact that they had been seen in the car together with those items of property. Mr Tamiefuna and the others had got out of the car and were gathering their belongings while they waited for a tow truck to arrive. At that point DS Bunting took photographs of the men with his mobile phone, as they stood on the side of the road. He also took photographs of some of the property they were taking from the car. Mr Tamiefuna was photographed wearing a dark cap with a light-coloured mark, maroon vest, beige trousers and black and white Asics shoes. At least one such photograph of Mr Tamiefuna was attached to the intelligence noting created by DS Bunting.

[10] A pair of black and white Asics trainers, matching the shoes seen in the CCTV footage from the service station and the photographs taken by DS Bunting, was subsequently seized in a search of a vehicle driven by Mr Tamiefuna on 28 December 2019.

---

4 Pursuant to s 114 of the Land Transport Act 1998.

[11] The Crown claimed that given Mr Tamiefuna was in the same blue Ford Falcon three days after the robbery, and was wearing the same clothing as the man seen with Mr Te Pou at the petrol station on the day of the robbery, the Court could be satisfied beyond reasonable doubt that Mr Tamiefuna had been Mr Te Pou's co-offender in the aggravated robbery of Mr Lim.

[12] Mr Tamiefuna originally faced a joint jury trial with his co-defendant Mr Te Pou. That trial was scheduled to commence in the High Court at Auckland on 12 July 2021. A number of pre-trial issues were argued before Moore J, and were dealt with in a judgment released on 15 February 2021.[5] Among the matters he considered was an application by the Crown for an order that the photographs taken by DS Bunting were admissible at the trial.[6] The Judge considered the photographs helped to pull together three "threads" of evidence that tended to prove that it was Mr Tamiefuna who was involved in the robbery of Mr Lim.[7] The first thread was the CCTV footage available of what happened in the driveway at Mr Lim's address. The second was the CCTV footage taken at the petrol station on the same day. The third was the photographs taken by DS Bunting on 5 November 2019. Together, the three strands of evidence supported the Crown's case that the man captured on the CCTV footage at Mr Lim's property was Mr Tamiefuna.[8]

[13] The defence challenged the admissibility of the third thread of evidence: the photographs taken by DS Bunting. Ms Gray argued for Mr Tamiefuna that they had been taken in the course of an unlawful and unreasonable search. They were thus improperly obtained evidence and should not be admitted pursuant to s 30 of the Evidence Act 2006.[9] Moore J rejected those contentions.[10]

[14] Mr Tamiefuna then sought leave to appeal the pre-trial decision as to the admissibility of the photographs. This Court declined that application.[11] The Court acknowledged that the argument that the taking of the photographs constituted

---

5 *R v Tamiefuna* [2020] NZHC 163.
6 At [109]–[136].
7 At [112].
8 At [112]–[115].
9 At [116]–[117].
10 At [125]–[136].
11 *Te Pou v R* [2021] NZCA 263 at [87].

unreasonable search or seizure was "novel, of general significance and … arguable".[12] But, it considered that there was insufficient time to deal with the issue properly before trial and the issue might more appropriately be considered by the Permanent Court.[13]

[15] Mr Tamiefuna subsequently successfully applied for severance of the only charge brought against him, aggravated robbery. He was granted leave to withdraw his previous election of trial by jury, and for the charge to be determined by judge alone.[14]

The trial

[16] The trial took place before Davison J on the basis of admissions filed under s 9 of the Evidence Act, and the evidence of DS Bunting. In giving his reasons for verdict, Davison J rejected the argument advanced by Mr Tamiefuna that the photographs taken by DS Bunting breached Mr Tamiefuna's right to be secure against unreasonable search and seizure, protected by s 21 of the New Zealand Bill of Rights Act 1990.[15]

[17] The Judge found that the stopping of the blue Ford Falcon by the police was a lawful exercise of the power in s 114(1) of the Land Transport Act. He considered the circumstances in which the decision to stop the vehicle was made were in accordance with the police functions described in s 9 of the Policing Act 2008, in particular law enforcement and crime prevention.[16] It was only when the police officer ascertained that the driver was unlicensed that he requested the passengers to provide their names and personal details, including dates of birth. There was no evidence to suggest that the police had an ulterior purpose for stopping the car or that there had been any prior "targeting" of the occupants.[17] These findings are not challenged on appeal.

[18] The Judge then said:

> [45] The defendant was very clearly in a public place when standing on the footpath beside a public road when the photographs of him were taken. The fact that until shortly beforehand he had been a passenger in a private vehicle

---

12 At [76].
13 At [82]–[84].
14 *R v Tamiefuna* HC Auckland CRI-2019-090-5558, 15 June 2021.
15 High Court conviction judgment, above n 1, at [51].
16 At [43].
17 At [44].

> does not provide a basis for him having a reasonable expectation of privacy once he had exited the vehicle and was standing on the roadside. Although he exited the vehicle as a result of the police impounding the vehicle, the necessity for him to get out of the car was a consequence of him travelling in a vehicle which was being driven by someone who was prohibited from driving. The police did not order him out of the car in order to get him into a public space where they could photograph him. As the sequence of events I have set out makes clear, the defendant was already out of the Ford Falcon and at the roadside attending to the removal of property from the vehicle when DS Bunting, having ascertained from an NIA database check that the three men all had recent criminal convictions for property offending and other serious offending and the defendant was subject to release conditions following a term of imprisonment, that he decided to make an intelligence noting and take photographs of the defendant to accompany it.

[19] The Judge also noted that there had been no element of concealment or secrecy in the way in which the photographs had been taken, commenting that DS Bunting was standing at a distance of approximately two metres or less directly in front of the defendant when he took the photographs; it was clear the defendant was well aware that he was being photographed.[18] The Judge rejected the submission that Mr Tamiefuna would have had a higher expectation of privacy because the event had taken place at night. He also found that in requesting and obtaining information from Mr Tamiefuna as to his name and date of birth and taking the photographs the police were not engaged in a process of gathering evidence in relation to alleged offending by Mr Tamiefuna.[19] The fact that the information obtained by searching the vehicle and the photographs subsequently became relevant because they were relied on by the Crown at the trial did not mean that they were obtained as a result of a search.[20] For these reasons, the Judge was satisfied that there had been no unreasonable search of Mr Tamiefuna in breach of s 21 of the Bill of Rights Act.[21]

[20] The Judge observed that even if taking the photographs constituted a search, he did not consider it was unreasonable in the circumstances. Mr Tamiefuna had been standing in a place well-lit by street lighting, and was not engaged in any private conversation or activity in respect of which he could have had a reasonable expectation

---

18 At [46].
19 At [47] and [50].
20 At [50].
21 At [51].

of privacy. Any intrusion on his privacy was only minimal and there was no suggestion that he objected to the photographs being taken at the time.[22]

[21] Finally, the Judge recorded his view that even if the photographs had been improperly obtained, he would have concluded that they should be admitted in the balancing process that would have been required under s 30(2)(b) of the Evidence Act.[23]

[22] For these reasons, and others that need not be discussed, the Judge found that the photographs were admissible. The Judge then analysed the evidence.[24] He was satisfied beyond reasonable doubt that Mr Tamiefuna was the man shown in the CCTV footage walking on Mr Lim's driveway at the time of the robbery shortly after 6 am on 2 November 2019. In making that finding, he was strongly influenced by distinctive features of the clothing being worn by the person shown walking on the driveway, its similarity to the clothing of the man pictured at the service station later that same day in the company of Mr Te Pou, and some of the clothing worn by Mr Tamiefuna at the time of the photographs taken by DS Bunting on 5 November 2019.[25] In the circumstances, the Judge found Mr Tamiefuna guilty of the aggravated robbery.[26]

The conviction appeal

[23] The conviction appeal was advanced on the basis that the photographs on which the Crown relied should have been ruled inadmissible because they were the result of a search carried out in breach of s 21 of the Bill of Rights Act. Ms Gray submitted in addition that the Judge failed to turn his mind to the applicability of ss 32 to 34 of the Policing Act. She submitted the Judge's conclusion that the evidence, even if properly obtained, would nevertheless have been admissible under s 30(2)(b) of the Evidence Act was also wrong. She argued that admission of the photographs meant that there had been a miscarriage of justice within the meaning of s 232(4) of the Criminal Procedure Act 2011.

---

22 At [52].
23 At [53].
24 At [57]–[62].
25 At [64]–[68] and [71].
26 At [73].

[24] In developing the argument Ms Gray submitted that the Judge erred in concluding that the taking of the photographs did not breach Mr Tamiefuna's reasonable expectations of privacy. She submitted the fact that the photographs had been taken in a public place was not determinative. Although presence in a public place would mean there was a lower expectation of privacy, that did not mean that there could be no expectation of privacy. The Judge should have regarded this as a neutral factor in determining whether a search had occurred, rather than one attracting significant weight.

[25] In addition, Ms Gray argued it was significant that Mr Tamiefuna was only standing on the roadside as a result of being asked to leave the vehicle, rather than of his own volition. Moments earlier, he had been a passenger in a car and in that location would have had a legitimate expectation of privacy. Ms Gray contended that expectation "remained unchanged" when he was ordered to leave the vehicle. She submitted the police could not take his photograph in a public place and assert he had no expectation of privacy where it was the actions of the police that caused him to leave the vehicle. This factor should have weighed more heavily with the Judge.

[26] Ms Gray also submitted that the Judge had failed to appreciate the significance of photographs as a "subset of biometric information". She argued that once in police possession, photographs are in the same category as DNA and fingerprint evidence. She submitted there was a legitimate analogy between photographs, fingerprints and DNA samples, on the basis that all are able to be used by the police in the identification of offenders. They are highly reliable in nature and more than capable of securing a conviction, as had occurred in this case. All three forms of evidence are akin to a "signature" of a person's identity, and part of a "biographical core of personal information", which s 21 of the Bill of Rights Act is designed to protect.[27]

[27] A further strand of Ms Gray's argument was the claim that the Judge had paid no regard to the fact that the photographs were taken in a way which made Mr Tamiefuna the direct subject of the photographs, at close proximity. She submitted this invaded his reasonable expectation of privacy. She noted that members of the

---

[27] Citing *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 at [63], referring to *R v Plant* [1993] 3 SCR 281 at 293.

public have a reasonable expectation they will not be approached by other individuals when out in public and have their photographs taken at close proximity without permission. Whilst doing this is not illegal, it is highly intrusive and contrary to accepted social norms. She contended that Mr Tamiefuna's expectation of privacy would have been further heightened because the person taking the photographs was a member of the police and not an ordinary citizen. She referred to authorities in which the Supreme Court of Canada emphasised the "fundamental difference between a person's reasonable expectation of privacy in his or her dealings with the State and the same person's reasonable expectation of privacy in his or her dealings with ordinary citizens".[28]

[28] Ms Gray also complained that the Judge had failed to recognise the significance of the fact that Mr Tamiefuna was not suspected of having committed any offence at the time his photograph was taken. There was a reasonable expectation that the police would not take Mr Tamiefuna's photograph to store in the NIA in circumstances where they had no cause to do so. He had been targeted and treated like a potential criminal, in circumstances where the police had no reasonable cause to suspect that any offence had been or would be committed. The police conduct was tantamount to pre-emptive evidence gathering. In these circumstances, taking the photographs was completely unjustified and amounted to the illegitimate targeting of an innocent citizen. This constituted a breach of Mr Tamiefuna's "right to be let alone".[29]

[29] Ms Gray was also critical of the Judge's reliance on the fact that Mr Tamiefuna had voluntarily provided his correct name when asked to do so by DS Bunting. The Judge considered Mr Tamiefuna must have done so knowing those details would be checked.[30] Ms Gray submitted the taking of the photographs was not a natural and inevitable consequence of the provision of his personal details and should not have been relied on in this way by the Judge.

---

28 Citing *Aubry v Éditions Vice-Versa inc* [1998] 1 SCR 591 at [8], referring to *R v Duarte* [1990] 1 SCR 30 at 43–45; and *R v Wong* [1990] 3 SCR 36 at 48–55.

29 Citing *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [10] per Elias CJ, referring to *Olmstead v United States* 277 US 438 (1928) at 478; and *Katz v United States* 389 US 347 (1967) at 350.

30 High Court conviction judgment, above n 1, at [46].

[30] For the respondent, Ms Brook submitted there had been no breach of s 21 of the Bill of Rights Act as the police had acted lawfully and reasonably in taking the photograph. She adopted that position after identifying two different conceptual approaches taken in the jurisprudence to the use of photography and other forms of recording what a person says or does. The case law she cited considered the use of audio and video recordings, as well as simply writing down what is said or done. On one view, making a record simply involves police officers capturing what they have seen or heard themselves, in the most accurate way possible. On this approach, for which Ms Brook referred to *Lopez v United States*, s 21 would not be engaged by the taking of a photograph in circumstances where the taker of the photograph can lawfully see the photograph's subject.[31]

[31] Ms Brook pointed to the contrary view as being that because such a record is permanent, and capable of being stored and disseminated in a way that cannot occur with simple recall from memory, the making and retention of the record intrudes on privacy interests to a greater degree than observation and recall. That approach has been taken in Canada in application of art 8 of the Canadian Charter of Rights and Freedoms.[32] It was settled in *R v Duarte* and confirmed in *R v Wong.*[33] On that approach, by analogy, s 21 of the Bill of Rights Act would be engaged and the focus would be on whether what was done was reasonable in the particular circumstances of the case.

[32] Neither approach, Ms Brook submitted, means there is an inherent breach of s 21 in the taking and retention of a photograph in circumstances where there is no breach of any other regulatory requirements. Rather, the enquiry is simply whether the police's conduct was lawful and reasonable, and it was plainly so here.

[33] This was so, because the vehicle had been lawfully stopped, the taking of the photographs was lawful and had not required a warrant, and DS Bunting had simply

---

31 See *Lopez v United States* 373 US 47 (1963), cited in *R v A* [1994] 1 NZLR 429 (CA) at 434. But see *Katz v United States*, above n 29, where the recording of conversations through use of a concealed device located at a public telephone booth was held to involve a breach of privacy: at 353.

32 Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK).

33 *R v Duarte*, above n 28, at 46; and *R v Wong*, above n 28, at 48.

created a reliable record of what he had seen. Further, the circumstances (in which Mr Tamiefuna had been travelling on a public road where a vehicle could be stopped at any time and was not engaged in any activity of a private nature) could not give rise to a reasonable expectation of privacy.

[34] If the Court were to conclude the evidence had been improperly obtained, Ms Brook argued the balancing exercise under s 30 of the Evidence Act would favour admission of the evidence. Further, she submitted that even if the evidence had been wrongly admitted there was no miscarriage of justice. Mr Tamiefuna was plainly the offender and if the photographs had been excluded the Crown could simply have called the officer who took it to give oral evidence as to what he saw. She submitted Mr Tamiefuna would have been in no position to challenge that evidence.

[35] At the hearing, we asked for and have since received further submissions on whether the police's conduct in the circumstances breached any of the information privacy principles set out in s 6 of the Privacy Act 1993 and what implications such a breach would have for the balancing exercise under s 30 of the Evidence Act. We note that the Privacy Act 2020 was not yet in force at the time the photographs were taken and accordingly counsel's submissions were directed at the applicability of the Privacy Act 1993.

[36] Ms Gray submitted that the police conduct in this case breached information privacy principles 1 and 3. She argued, relying on Elias CJ's dissenting reasons in *R v Alsford*,[34] that this breach constituted a "standalone ground" for treating the evidence as improperly obtained under s 30(5)(a) of the Evidence Act. Further, breach of the principles was relevant to whether the police conduct could be properly characterised as involving a breach of a reasonable expectation of privacy.

[37] Although Ms Brook conceded they were engaged, she argued the information privacy principles were not breached. In terms of principle 1, DS Bunting had a legitimate basis for believing that his observations might become important for law enforcement purposes, as proved to be the case. Although he could have simply written down a description of Mr Tamiefuna, such a record could have been challenged

---

[34] See *R v Alsford*, above n 27.

on grounds of accuracy or reliability. Ms Brook submitted that principle 3 was inapplicable because the police did not collect information from Mr Tamiefuna. Finally, Ms Brook argued, in reliance on the majority's decision in *R v Alsford*, that any breach of the information privacy principles is unlikely to be an independent ground for finding that evidence is improperly obtained under s 30 of the Evidence Act,[35] though she accepted that such a breach can be considered in determining whether there has been a breach of a reasonable expectation of privacy.

Analysis

Unreasonable search and seizure

[38] Section 21 of the Bill of Rights Act affirms that:

> Everyone has the right to be secure against unreasonable search and seizure, whether of the person, property, or correspondence or otherwise.

[39] The issue presented by the present facts is whether the actions of the police in taking Mr Tamiefuna's photographs and retaining them amounted to an unreasonable search of him. In the analysis that follows, we first address the relevance of the Supreme Court's decision in *Hamed v R*.[36] We then consider whether, in light of that decision, the taking of a photograph in a public place can constitute a search, and whether the taking of the photographs in this case was a search of Mr Tamiefuna. We then assess whether the search was unreasonable. Finally, we note a number of other considerations which support our conclusion that Mr Tamiefuna's s 21 right was breached.

The Supreme Court's decision in *Hamed v R*

[40] The issue presented must be approached in light of the judgments given by the Supreme Court in *Hamed v R*. In that case the police received information suggesting the defendants were participating in a series of "quasi-military" training camps taking place on forested lands owned by various trusts associated with Ngāi Tūhoe iwi.[37] The police applied for and were issued search warrants under s 198 of the

---

35 Citing *R v Alsford*, above n 27, at [37]–[40].
36 *Hamed v R*, above n 29.
37 At [91].

Summary Proceedings Act 1957. Despite the warrants not authorising them to do so, the police then installed cameras on private land not open to the public, on private land which was open to the public for recreational purposes, and in another case on private land to record traffic passing on a public road.

[41] On the basis of the evidence captured by using the surveillance cameras, charges were laid against 11 defendants under the Arms Act 1983 and the Crimes Act 1961. The defendants challenged the admissibility of the evidence in the High Court, which ruled the evidence was improperly obtained as it had not been authorised by the search warrants.[38] Nevertheless, the High Court held the evidence was admissible applying s 30 of the Evidence Act.[39] On appeal, this Court held that, subject to one exception, the video evidence had been lawfully obtained.[40] In the one instance where the Court found that police had trespassed when installing a camera, the Court held there was no breach of s 21 of the Bill of Rights Act and the evidence should be admitted under s 30 of the Evidence Act.[41] The Court also indicated that even if other evidence not been lawfully obtained, it would have been admissible under s 30.[42]

[42] Leave was granted to appeal to the Supreme Court.[43] As part of analysing whether the evidence had been improperly obtained, Blanchard J concluded there would be a search when information-gathering activity invades a person's reasonable expectation of privacy. Blanchard J considered that assessing whether an activity intrudes on a person's reasonable expectation of privacy required consideration of two elements: whether that person subjectively had an expectation of privacy at the time the activity occurred, and whether that expectation was one that society was prepared to recognise as reasonable. Blanchard J reasoned that surveillance of a public place would not generally be regarded as a search because it does not, objectively, involve any state intrusion on reasonable expectations of privacy.[44] He noted that this position may not be the same if surveillance was technologically enhanced so as to capture

---

38 See *R v Bailey* HC Auckland CRI-2007-085-7842, 7 October 2009.
39 See *R v Bailey* HC Auckland CRI-2007-085-7842, 15 December 2009.
40 See *Hunt v R* [2010] NZCA 528, [2011] 2 NZLR 499.
41 At [75] and [89].
42 At [90].
43 *Hamed v R [Leave]* [2011] NZSC 27, [2011] 3 NZLR 725.
44 *Hamed v R*, above n 29, at [163] and [167], citing *R v Wise* [1992] 1 SCR 527 at 533.

beyond what can be seen by the naked eye.[45] In *Alsford*, the Supreme Court considered that although it is not entirely clear, Blanchard J appeared to have majority support on this test.[46]

[43] Blanchard J went on to state that where a search is found to have taken place, the next question is whether the search was reasonable. The answer to that second question would depend on the degree of intrusion into privacy, together with the nature of the place or object searched, and the reasons why the search took place.[47]

[44] The majority also held that an unlawful search would generally amount to an unreasonable search, and that this applied to all cases except where the breach was minor or technical or where the police had a reasonable but erroneous belief that they were acting lawfully.[48] On the facts, it appears that the Supreme Court unanimously held that the appellants had a reasonable expectation of privacy in respect of the surveillance and searches that had taken place on private land but,[49] by a majority, held this expectation did not extend to the surveillance of traffic on the public road.[50]

[45] There is no doubt, on the approach adopted by the majority in *Hamed v R*, that the taking of a photograph can constitute a search. Blanchard J observed that a search can be conducted personally by a law enforcement officer or by means of technology, and both might occur when, for example, a police officer enters a building and takes photographs or makes a video recording.[51] The Crown has not attempted to argue the contrary.

---

45 At [167]. Blanchard J gave the example of infra-red imaging.

46 *R v Alsford*, above n 27, at [48], citing *Lorigan v R* [2012] NZCA 264, (2012) 25 CRNZ 729 at [15]–[22].

47 *Hamed v R*, above n 29, at [172].

48 At [174] per Blanchard J, [226] per Tipping J, and [263], n 265 per McGrath J. Gault J did not explicitly comment on this point, though he agreed with Blanchard J's reasons for determining that the appellants' rights under s 21 were breached: at [281].

49 At [8] per Elias CJ, [171] and [176]–[178] per Blanchard J, [227] per Tipping J, [263] per McGrath J and [281] per Gault J.

50 At [171] and [178] per Blanchard J, [263] per McGrath J and [281] per Gault J.

51 At [166].

[46] In a passage in *Hamed* that is important for present purposes, Blanchard J said:[52]

> [167] Video surveillance may constitute a search, depending upon the place which is the subject of the surveillance. If the surveillance is of a public place, it should generally not be regarded as a search (or a seizure, by capture of the image) because, objectively, it will not involve any state intrusion into privacy. People in the community do not expect to be free from the observation of others, including law enforcement officers, in open public spaces such as a roadway or other community-owned land like a park, nor would any such expectation be objectively reasonable. …

[47] This passage, directed specifically to video surveillance, must apply equally to photographs taken by police officers in a public place while carrying out their duties. However it can be seen from the language Blanchard J used that he was not intending to be categorical, but was expressing a general proposition ("it should generally not be regarded as a search") based on the absence of any state intrusion into privacy in open public spaces. This seems to allow for the possibility that there might be cases where surveillance of a public place may give rise to a search, especially where it can be shown that there was a reasonable expectation of privacy in the particular circumstances that arose.

[48] This was clearly contemplated by Elias CJ, whose approach differed from that of Blanchard J. She held directly that, in principle, there is no reason why activity in a public place should, by virtue of that circumstance alone, be outside the protection of s 21. It was consistent with the values in the Bill of Rights Act that people might have reasonable expectations to be "let alone by State agencies even in public spaces in their private conversations and conduct". And she recognised a "public interest in maintaining … a human right space for privacy in such settings".[53]

[49] Tipping J took a different approach again. He appears to have contemplated that there would be a search where there was surveillance of a public place by the use

---

52 Footnote omitted.
53 At [12].

of technology and where the police were "consciously looking for something or somebody".[54] He said:

> [222] I favour an approach which is liberal as to what constitutes a search for the purposes of s 21, with more of the work being done under the section by the unreasonableness criterion. On this basis surveillance in a public place may well constitute a search but its reasonableness would be influenced by the public nature of the target area.

[50] He considered that reasonable expectations of privacy were not relevant to deciding whether a search has taken place. He observed:

> [221] In contrast to the use of eyes and ears, modern technology has the capacity to be more covert, intrusive and sustained. That feature gives rise to questions of reasonableness rather than whether a search has taken place. …

[51] The question of reasonable expectations of privacy could then be examined at a subsequent stage of the enquiry when those expectations would be relevant to deciding whether the search was unreasonable. He said:

> [224] The line between there being no reasonable expectation of privacy involved and only a slight expectation may sometimes be a fine one. I see no merit in bringing that sort of inquiry into the more objective issue of whether a search has taken place, as opposed to the more value-laden issue of whether a search was unreasonable. …

[52] McGrath and Gault JJ also delivered judgments in *Hamed*, mainly focusing on the application of s 30 of the Evidence Act. However, McGrath J agreed with Blanchard J that the evidence from video camera surveillance had been improperly obtained in terms of s 30(2)(a), requiring consideration of whether its exclusion would be a proportionate response.[55] And Gault J specifically agreed with Blanchard J's conclusion that the appellants' rights under s 21 of the Bill of Rights Act had been breached.[56]

[53] Despite the differences between the judgments delivered in *Hamed*, it is possible to attempt a degree of reconciliation between the positions they espoused, once it is accepted that the majority did not rule out the possibility that there could be a search arising out of surveillance in a public place. That possibility leaves room for

---

54 At [220].
55 At [263].
56 At [281].

this Court to consider whether there was a breach of s 21 in the circumstances of this case, noting Elias CJ's clear statement that there could be a breach of s 21 notwithstanding that what occurred took place in a public location, and Tipping J's acceptance that there could be a search arising from surveillance in a public place.

[54] As noted above, the context of the statements made in the different judgments delivered in *Hamed* was an extensive police surveillance operation involving what was apprehended to be serious criminal offending. Most of the surveillance took place on private land, but there was also surveillance of vehicle movements on a public road. We are concerned in this case with very different circumstances. Mr Tamiefuna was a passenger in a car being driven on a public road. The vehicle was stopped and then impounded by the police when they learnt the driver was unlicensed. That caused the occupants to leave the vehicle. DS Bunting had become suspicious about the men and the contents of the car and those suspicions were reinforced by the enquiries he made into their offending history.

[55] It was in these circumstances that he took the photographs, including that of Mr Tamiefuna. He captured Mr Tamiefuna's image for the purposes of identification. This was not a case of surveillance where the police were consciously looking for evidence of serious criminal offending. Rather, DS Bunting took advantage of the opportunity that had presented itself to take the photographs, apparently on the basis that the information might be useful in the future. That is the context in which we have to assess whether there was breach of Mr Tamiefuna's rights under s 21.

Was the taking and retention of Mr Tamiefuna's photographs a "search" of him for the purposes of s 21 of the Bill of Rights Act?

[56] It may be readily accepted that persons in a public place can have a low expectation of privacy; they can expect to be observed. But we find it hard to accept that stepping into a public space means people are thereby submitting to the obtrusion on privacy necessarily involved in the taking of a photograph for identification purposes by police. It is both the use of the camera and the involvement of the police that makes the difference. It creates a record of the subject's appearance and, depending on the framing, their location. We consider that many would find that an

unreasonable intrusion, and that distinguishes this case from the reasoning applied by the majority in *Hamed*.

[57] We make those observations in relation to law enforcement photography in public, while acknowledging the observations of Tipping J in *Hosking v Runting* that "seizing the image of a person who is in a public place could hardly be regarded as unreasonable, unless there was some very unusual dimension in the case".[57] Here it is necessary to bring to bear the fact that the photographer is a police officer, a representative of a state agency, who was deliberately capturing the image for identification purposes. We consider there is a reasonable expectation that will not occur in a public place without a good law enforcement reason.

[58] In fact, we see a number of difficulties with the Judge's conclusion that there was no search. The starting point is that there is no definition of "search" in either the Bill of Rights Act or the Search and Surveillance Act 2012. So the definition of that term has effectively been left to the courts. In accordance with the majority judgment in *Hamed*, the question of whether there was a search is to be addressed by asking whether Mr Tamiefuna had a reasonable expectation of privacy in the circumstances in which the photographs were taken. We are of the view he did. The photographs were taken at night, after he had been compelled by circumstances to leave the vehicle. We would not describe the situation as one in which Mr Tamiefuna could be taken to have expected to be photographed. That implies there was a search, adopting the analytical approach of the majority in *Hamed*.

Was the search unreasonable?

[59] Having concluded that the taking of the photographs constituted a search, we now turn to whether the taking and retention of the photographs was in the circumstances unreasonable. On the approach of Blanchard J in *Hamed*, that involves enquiry into:[58]

---

57 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [226]. Tipping J's scepticism about the notion that a photograph could amount to a search or seizure seems to be at odds with the approach of Blanchard J in *Hamed,* as well as Tipping J's acceptance in that case (at [222]) that "surveillance in a public place may well constitute a search".

58 *Hamed v R*, above n 29, at [172].

> … the nature of the place or object which was being searched, the degree of intrusiveness into the privacy of the person or persons affected and the reason why the search was occurring.

As we have noted above,[59] an unlawful search will generally amount to an unreasonable search.

[60] It is helpful here to consider the idea that the police have a general power to photograph persons in public places in the context of specific statutory powers that have been conferred to take photographs. First, we mention the power to obtain identifying particulars of persons in custody set out in s 32 of the Policing Act.

[61] Section 32 provides as follows:

> **32 Identifying particulars of person in custody**
>
> (1) The purpose of this section is to enable the Police to obtain information that may be used now or in the future by the Police for any lawful purpose.
>
> (2) For the purpose of this section, a constable may take the identifying particulars of a person who is in the lawful custody of the Police if that person is detained for committing an offence and is—
>
> (a) at a Police station; or
>
> (b) at any other place being used for Police purposes.
>
> (3) A constable—
>
> (a) must take the person's identifying particulars in a manner that is reasonable in the circumstances; and
>
> (b) may only use reasonable force that may be necessary to secure the person's identifying particulars.
>
> (4) A person who, after being cautioned, fails to comply with a direction of a constable exercising his or her powers under this section—
>
> (a) commits an offence; and
>
> (b) is liable on conviction to imprisonment for a term not exceeding 6 months, to a fine not exceeding $5,000, or to both.
>
> (5) In this section and section 33,—

[59] Above at [44].

> **identifying particulars** means, in relation to a person, any or all of the following:
>
> > (a) the person's biographical details (for example, the person's name, address, and date of birth):
> >
> > (b) the person's photograph or visual image:
> >
> > (c) impressions of the person's fingerprints, palm-prints, or footprints
>
> **place** includes any land, building, premises, or vehicle.

[62] A person's photograph or visual image is within the definition of "identifying particulars", set out in s 32(5)(b). The purpose of the provision is to enable the police to obtain information to be used for a lawful purpose "now or in the future". Section 32(2) contains a specific power to take the identifying particulars of a person detained for committing an offence. Its use is limited to circumstances where a person is in lawful custody. That of course may occur, and frequently does, in a public place.

[63] This specific conferral of the power to take photographs, or any other identifying particulars, in circumstances delimited by the section, sits unhappily alongside the notion that the police have a general right to take and retain photographs of members of the public. The same may be said of the equivalent conferral of power given by s 33 of the Policing Act to enable the police to detain a person who "a constable … has good cause to suspect … of committing an offence" when intending to proceed against that person by way of summons.

[64] Photographs taken under the authority of either of those provisions may be entered, recorded and stored (along with the other identifying particulars) on a police information recording system under s 34(1) of the Act. However s 34(2) provides as follows:

> (2) But photographs or visual images of a person, and impressions of a person's fingerprints, palm-prints, or footprints, that are obtained under section 32 or 33 must be destroyed as soon as practicable after—
>
> > (a) a decision is made not to commence criminal prosecution proceedings against the person in respect of the offence for which the particulars were taken; or
> >
> > (b) criminal prosecution proceedings that are commenced against the person in respect of the offence for which the particulars

> were taken are completed with an outcome (for example, an acquittal) that is not an outcome (specified in section 34A) that authorises continued storage.

[65] It can be seen that a photograph taken under the authority conferred by ss 32 or 33 must be destroyed as soon as practicable after a decision is made not to prosecute the person photographed, or the proceedings have been commenced and completed with an outcome (such as an acquittal) that does not authorise continued storage, as detailed in s 34A. Outcomes which enable continued storage under the latter provision are those where the offending has been admitted and a programme of diversion completed, convictions have been entered, certain orders have been made under the Oranga Tamariki Act 1989 or there has been a discharge under s 106 of the Sentencing Act 2002. In short, unless the offence for which the photograph has been taken has been established, the photograph must be destroyed.

[66] It is significant also that s 34(3) defines "criminal prosecution proceedings" for the purposes of both ss 34 and 34A. The relevant proceedings as defined are "in respect of the offence for which the particulars were taken". This continues what can be said to be the theme of these provisions — namely, that the photographs are authorised in respect of persons detained for committing an offence or who are to be summonsed in respect of an offence which the constable has "good cause to suspect" has been committed.

[67] This careful statutory scheme is inconsistent with any suggestion that the police may photograph persons and retain their images without bringing any charge and without any obligation to destroy the images. As we understand it, that is what happened here. There is no evidence that any inquiry was carried out in relation to the items observed by DS Bunting in the impounded car. No charge was brought in relation to anything found in the car. And it is not suggested that Mr Tamiefuna was detained by the police. The powers to photograph in the Policing Act could not have been exercised against him.

[68] It is instructive also to note the power, contained in s 16 of the Search and Surveillance Act, to conduct a warrantless search of a person in a public place where there are reasonable grounds to believe the person possesses evidential material

relating to an offence punishable by imprisonment for a term of 14 years or more (or an offence against s 6B(1) of the Terrorism Suppression Act 2002). Clearly, that power could not have been exercised in the circumstances of this case. But the restrictive nature of the circumstances in which that power may be exercised is another indication that police powers to photograph in a public place and retain the images are intended to be closely confined.

[69] Our conclusion that the police do not, in circumstances such as these, have a general power to photograph persons in the public realm and retain the images suggests that taking and retaining the photographs of Mr Tamiefuna was unreasonable. The police's conduct did not conform with the circumstances in which Parliament has authorised such conduct on the part of the police.

[70] We acknowledge there is no suggestion that the police knew what they did lacked legal authorisation. So too, the facts that the photographs were taken in public and without objection mean that the intrusion on privacy interests was, at least in relative terms, modest. We have, however, reached the conclusion that the search was unreasonable. The decisive point here concerns the factual setting — being one in which no attempt was made to show the photographs were taken or retained in the context of an ongoing police inquiry or for any other lawful purpose. Different considerations would apply if there were such an inquiry, and subsequent prosecution.

[71] On this issue, it will be recalled that the Judge specifically found that the police were not at the time the photographs were taken engaged in a process of gathering evidence in relation to alleged offending by Mr Tamiefuna; this was part of the reasoning that led him to conclude there had been no search.[60] We cannot accept that the police have a free-ranging right to take and retain close-up photographs of members of the public acting lawfully in public places, perhaps because they look suspicious or different. We do not consider such a right would be accepted by society as reasonable.

[72] The only basis on which the existence of such a right might be asserted is that there was no specific statutory or common law prohibition against the actions carried

---

[60] High Court conviction judgment, above n 1, at [50]–[51].

out by the police. Support for that reasoning might be derived from observations of Tipping J in *Hamed*,[61] and a number of cases decided by this Court in which police use of cameras in the context of surveillance operations monitoring private properties for varying lengths of time has been held to be lawful.[62] One such case is *Lorigan v R*, where this Court said:[63]

> [29] … the covert video surveillance (whether with enhanced-vision equipment or not) was lawful, because there was no statutory or common law prohibition of such activity and it would not have been unlawful for a citizen to do the same thing. The matter would, of course, have been different if the surveillance had involved any element of trespass by the police, because the trespass would have made the police actions unlawful. There was no trespass in the present case because the police had obtained the permission of the owner of the property on which the surveillance cameras were placed.

[73] The idea that the police may do anything that a private citizen may do is conceptually linked to what has come to be referred to as the "third source" of authority for the actions of members of the executive.[64] It is a doctrine espoused amongst others by Professor Bruce Harris, who has written extensively on the issue.[65] The third source doctrine has not been definitively embraced in New Zealand or the United Kingdom.[66] In *Quake Outcasts v Minister for Canterbury Earthquake Recovery*, the Supreme Court expressly refrained from comment on the existence or the extent of residual Crown powers, on the basis that the statute it was considering "cover[ed] the field".[67] In a footnote, that Court expressed what was apparently a wider reservation as to whether the third source of authority exists.[68]

---

61 *Hamed v R*, above n 29, at [215]–[217].

62 See for example *Lorigan v R*, above n 46; *R v Fraser* [1997] 2 NZLR 442 (CA); and *R v Gardiner* (1997) 15 CRNZ 131 (CA).

63 *Lorigan v R*, above n 46.

64 The third source of authority is said to exist in addition to the positive law authority for the government to act, provided by statute and prerogative powers.

65 See for example BV Harris "The 'Third Source' of Authority for Government Action" (1992) 108 LQR 626; BV Harris "The 'Third Source' of Authority for Government Action Revisited" (2007) 123 LQR 225; BV Harris "Government 'Third Source' Action and Common Law Constitutionalism (2010) 126 LQR 373; and BV Harris "A Call to Maintain and Evolve the Third Source of Authority for Government Action" (2017) 27 NZULR 853.

66 The third source doctrine first rose to prominence in the United Kingdom when it was accepted by Sir Robert Megarry V-C in the case of *Malone v Metropolitan Police Commissioner* [1979] Ch 344 (Ch) at 366–367. But see *R (New London College Ltd) v Secretary of State for the Home Department* [2013] UKSC 51, [2013] 1 WLR 2358 at [28] in which a majority of the Supreme Court noted it was "open to question whether the analogy with a natural person is really apt in the case of public or governmental action, as opposed to purely managerial acts".

67 *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1 at [112].

68 At [112], n 152.

[74] This is not the case for a lengthy discussion of the third source doctrine. It is sufficient for present purposes to treat both *Lorigan* and the other cases it discussed as illustrating that the police have authority to investigate crime and carry out actions that are reasonably incidental to that purpose. *Lorigan* and the other cases which it reviewed are examples of police activity that was lawful because the actions were incidental to ongoing and bona fide police investigations. In such cases the police conduct would be lawful under the "reasonably incidental doctrine" discussed by Professor Philip Joseph.[69] But unlike *Lorigan*, this case comes to us with a finding that there was no such investigation of Mr Tamiefuna underway when his photographs were taken: as the Judge found, the police were not engaged in a process of gathering evidence in relation to alleged offending by him when his photographs were taken.[70]

[75] The present context is not an appropriate one in which to adopt an expansive view of the extent to which police may be able to rely on the third source doctrine. As Professor Joseph recognises, a specific power should be found where the government or a public authority imposes a liability or detriment on a citizen or interferes with a citizen's liberty or property.[71]

Other considerations

[76] We are fortified in our conclusion that Mr Tamiefuna's s 21 right was breached by some other considerations. First, we note that a similar legislative regime limiting police powers is in force in Australia. There, the taking of photographs of persons by police officers is regulated by s 3ZJ of the Crimes Act 1914 (Cth). That provision relevantly states:

> **3ZJ Taking fingerprints, recordings, samples of handwriting or photographs**
>
> (1) In this section and in sections 3ZK and 3ZL:
>
> ***"identification material"***, in relation to a person, means prints of the person's hands, fingers, feet or toes, recordings of the person's voice, samples of the person's handwriting or photographs (including video

---

69 See Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 726–728.

70 High Court conviction judgment, above n 1, at [50].

71 Joseph, above n 69, at 724, citing *Entick v Carrington* (1765) 19 State Tr 1030, 95 ER 807 (KB).

recordings) of the person, but does not include tape recordings made for the purposes of section 23U or 23V.

(2) A constable must not:

(a) take identification material from a person who is in lawful custody in respect of an offence except in accordance with this section; or

(b) require any other person to submit to the taking of identification material, but nothing in this paragraph prevents such a person consenting to the taking of identification material.

…

(6) Subject to this section, a constable must not take identification material (other than hand prints, finger prints, foot prints or toe prints) from a suspect who:

…

(b) has not been arrested and charged;

unless a magistrate orders that the material be taken.

…

(12) Despite this section, identification material may be taken from a person who:

(a) is at least 18; and

(b) is capable of managing his or her affairs; and

(c) is not a suspect;

if the person consents in writing.

[77] It seems clear that the photographing of Mr Tamiefuna in the circumstances would not have been authorised in Australia under this provision, unless the photographs were taken with his consent. Here the Judge found there was no suggestion that Mr Tamiefuna objected to the photographs being taken, but that of course is not a finding that he consented. It may be noted also that the power to take the photograph of a person who is not a suspect under the Australian legislation (Mr Tamiefuna never achieved that status in respect of the events giving rise to the taking of the photographs) requires consent in writing. It would be surprising, we think, if this country's laws were less protective than Australia's in this field.

[78] Second, since this case was argued, the Privacy Commissioner | Te Mana Mātāpono Matatapu and the Independent Police Conduct Authority | Mana Whanonga Pirihimana Motuhake have released a joint report about police practices when photographing members of the public.[72] The joint report emphasises that police need to comply with the information privacy principles in the Privacy Act 2020 in circumstances where photographs are taken outside the specific authority contained in other statutes.[73]

[79] Given that we have not heard argument about the implications of the joint report we do not discuss it in detail. Notwithstanding this, we note that, in the section dealing with traffic stops and checkpoints, the joint report recognises that the Land Transport Act does not provide general authorisation for police to take photographs of members of the public while at a traffic stop, and Privacy Act information privacy principles should be applied, including the consideration of whether the photograph is necessary for the purpose of the stop. The report also noted that intelligence gathering is not a lawful purpose for photograph-taking under the Land Transport Act.[74]

[80] We consider that, contrary to the submissions of Ms Brook, the police's conduct on the facts of this case did involve a breach of the information privacy principles. At least three principles appear to be relevant. First, it appears likely that the police's conduct involved a breach of information privacy principle 1. This principle provides that personal information shall not be collected by any agency unless it is collected for a lawful purpose connected with a function or activity of that agency. As we discuss below at [90], DS Bunting had suspicions about the property he observed in the vehicle. There can be no doubt that the investigation of such suspicions constitutes a lawful purpose that the police are tasked with performing. However, as noted already, the Judge at first instance found that the police were not engaged in such an investigation at the time the photographs were taken.[75] That

---

72 Privacy Commissioner | Te Mana Mātapono Matatapu and Independent Police Conduct Authority | Mana Whanonga Pirihimana Motuhake *Joint inquiry by the Independent Police Conduct Authority and the Privacy Commissioner into Police conduct when photographing members of the public* (September 2022).

73 At 7.

74 At 80. This issue is relevant under information privacy principle 1(1): see Privacy Act 1993, s 6.

75 High Court conviction judgment, above n 1, at [50].

finding is not challenged on appeal. That must mean, in terms of information privacy principle 1, that the collection of Mr Tamiefuna's information through the taking of his photographs was not for a lawful purpose connected with policing.

[81] Secondly, in terms of information privacy principle 3(1), no claim is made by the Crown that DS Bunting took any steps to inform Mr Tamiefuna of the purpose for which his photograph was being taken, who would be able to view the photographs, whether he was authorised to take the photographs, the consequences of not consenting to the taking of the photographs or Mr Tamiefuna's rights of access to the photographs. Nor, in terms of principle 3(4), which sets out when an agency is not required to comply with 3(1), is it suggested that DS Bunting had reasonable grounds for not complying with those steps.

[82] Third, information privacy principle 9 requires that an agency holding personal information must not keep the information for longer than is required for the purposes for which the information may lawfully be used. Here, as noted earlier, the photographs were not taken for the purpose of an investigation, so the image should not have been retained. This principle stands against the casual taking and retention of photographs on the basis that, some day, they might be useful.

[83] While it is clear from s 11(2) of the Privacy Act that (with an exception not relevant here) breaches of any of the information privacy principles do not create rights enforceable in a court of law, we think the principles must be relevant to the judgment of a court considering what reasonable expectations of privacy ought to encompass in accordance with modern societal expectations.[76]

[84] Limits on the ability of police to photograph people engaged in lawful conduct in a public place have been recognised in the United Kingdom, in the application of art 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) which provides for the right to respect for a

---

[76] Compare what was said in by the majority in *R v Alsford*, above n 27, at [38]. We see no reason why the information privacy principles should not be relevant to our appreciation of the issue of reasonable expectation of privacy as well as the relevance acknowledged by the Supreme Court in that case, namely to interpretation of the Search and Surveillance Act 2012 and s 30(2) and (5)(c) of the Evidence Act 2006.

person's private and family life, home and correspondence.[77] Notwithstanding the different context, Ms Gray relied on *Regina (Wood) v Commissioner of Police of the Metropolis* and claimed that there was little material distinction between the facts of that case and the present.[78]

[85] In *Wood*, the Metropolitan Police had anticipated that unlawful activity might take place at the annual general meeting (AGM) of a company connected to the arms trade. They deployed a number of intelligence-gathering teams around the hotel where the event was taking place to "gather intelligence, primarily by taking photographs and making notes which may be of subsequent evidential value should offences be committed".[79] Mr Wood attended the AGM. When he left, photographs were overtly taken of him. Mr Wood's impression was that the "photographer was working continuously for some time",[80] although in the result there were only two clear front-on images of him.[81] The police retained the photographs of Mr Wood subject to what they said were "strict controls", including that they would not be accessible for general intelligence purposes.[82] Mr Wood claimed that his right to privacy under art 8 of the European Convention was breached by the taking and retention of the photos.

[86] The Court unanimously found that the activities interfered with Mr Wood's art 8 right.[83] Although Laws LJ ultimately found himself in dissent (on the question whether the interference was a proportionate one), both Dyson LJ and Lord Collins agreed with his analysis that there was a prima facie breach of art 8.

[87] Drawing on European jurisprudence, Laws LJ identified personal autonomy as the "central value protected by the right".[84] He observed:

> [21] The notion of the personal autonomy of every individual marches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the principle that every interference with the freedom of the

---

77 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

78 *Regina (Wood) v Commissioner of Police of the Metropolis* [2009] EWCA Civ 414, [2010] 1 WLR 123.

79 At [66].

80 At [2].

81 At [3].

82 At [2].

83 At [46] per Laws LJ, [64] per Dyson LJ and [96] per Lord Collins.

84 At [20].

> individual stands in need of objective justification. Applied to the myriad instances recognised in the article 8 jurisprudence, this presumption means that, subject to the qualifications I shall shortly describe, an individual's personal autonomy makes him—should make him—master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image, of which the cases speak; and also of the "zone of interaction" … between himself and others. He is the presumed owner of these aspects of his own self; his control of them can only be loosened, abrogated, if the state shows an objective justification for doing so.

[88] Turning to assess the case, Laws LJ held that art 8 was engaged in the circumstances, even though it had been previously held that the "*mere taking*" of a photograph in a public place was not of itself sufficient to engage art 8 and something more was needed than the "snapping of the shutter".[85] He said:

> [45] … it is important to recognise that state action may confront and challenge the individual as it were out of the blue. It may have no patent or obvious contextual explanation, and in that case it is not more apparently rational than arbitrary, nor more apparently justified than unjustified. In this case it consists in the taking and retaining of photographs, though it might consist in other acts. The Metropolitan Police, visibly and with no obvious cause, chose to take and keep photographs of an individual going about his lawful business in the streets of London. This action is a good deal more than the snapping of the shutter. The police are a state authority. And as I have said, the claimant could not and did not know why they were doing it and what use they might make of the pictures.
>
> [46] In these circumstances I would hold that article 8 is engaged. On the particular facts the police action, unexplained at the time it happened and carrying as it did the implication that the images would be kept and used, is a sufficient intrusion by the state into the individual's own space, his integrity, as to amount to a prima facie violation of article 8(1). It attains a sufficient level of seriousness and in the circumstances the claimant enjoyed a reasonable expectation that his privacy would not be thus invaded. …

[89] While Laws LJ went on to find that the limit on Mr Wood's right was proportionate, both Dyson LJ and Lord Collins were not persuaded that was so. Even though the aims of the police (being the prevention and detection of crime) were legitimate, they could not justify the retention of photographs after it had become abundantly clear within days of the AGM that no offences had been committed there, by the claimant or by anybody else. The suggestion that the police might be entitled to retain them just in case the claimant might commit an offence at a subsequent meeting was not persuasive.[86]

---

85 At [35].

86 At [86]–[90] per Dyson LJ and [97] per Lord Collins.

[90] Unlike Mr Wood, who had no previous convictions, as noted earlier, all the occupants of the vehicle stopped by the police had convictions for property offending and Mr Tamiefuna was on parole. DS Bunting discovered this shortly after he stopped the vehicle. Further, DS Bunting gave evidence that he found it suspicious that there was a women's handbag and four car batteries inside the car.

[91] But it is significant that there was no evidence that those suspicions were ever investigated: any suspicion there might have been was plainly insufficient to prompt any subsequent action. And, as already noted, the police were not engaged in investigating any alleged offending by Mr Tamiefuna at the time they took his photograph.[87] Given that, the taking and retention of the photographs was an intrusion on Mr Tamiefuna's privacy that was inconsistent with his reasonable expectations, on the approach outlined by Laws LJ in *Wood*. And on the approach of the majority in *Wood*, that intrusion was not proportionate even if there was a (transient) law enforcement purpose for the initial taking of the photographs.

[92] Of relevance too are cases in which the European Court of Human Rights has emphasised the importance of limiting the period for which electronic data about individuals is retained. In *Catt v United Kingdom*, the Court accepted that although the police may have been justified in collecting the relevant data about Mr Catt (which largely comprised written reports as to his presence at various protests, some of which described his appearance), there was no pressing need for its retention.[88] It observed:[89]

> … in the absence of any rules setting a definitive maximum time limit on the retention of such data the applicant was entirely reliant on the diligent application of the highly flexible safeguards in the [code of practice on the management of police information] to ensure the proportionate retention of his data. Where the state chooses to put in place such a system, the necessity of the effective procedural safeguards becomes decisive … Those safeguards must enable the deletion of any such data, once its continued retention becomes disproportionate.

---

87 High Court conviction judgment, above n 1, at [50].

88 *Catt v United Kingdom* ECHR 43514/15, 24 January 2019. The data was stored in a database maintained by the police which had no statutory foundation and was based on common law powers to obtain and store information said to be of likely assistance to the police in carrying out their functions. It was however subject to the Data Protection Act 1998 (UK) and to administrative codes of conduct issued under the Police Act 1996 (UK).

89 At [119].

[93] It is also appropriate to refer to *Gaughran v United Kingdom*,[90] in which the applicant, who had been convicted of a minor offence in Northern Ireland, complained about the taking and indefinite retention of his DNA profile, fingerprints and photograph by the police. Relevantly, the European Court noted that it was "somewhat novel" from the perspective of its case law to find that the retention and use of photographs taken on arrest by law enforcement authorities amounted to a prima facie violation of an applicant's art 8 rights.[91] However, it also referred to the need to "have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that might be obtained".[92] As such, it held:[93]

> In the present case, given that the applicant's custody photograph was taken on his arrest and will be held indefinitely on a local database for use by the police and that the police may also apply facial recognition and facial mapping techniques to the photograph, the Court has no doubt that the taking and retention of the applicant's photograph amounts to an interference with his right to private life within the meaning of Article 8 § 1.

[94] The Court went on to find that the rights limitation was unjustified. Retention had to be justified in light of its purpose, being to assist in the identification of future offenders. The Court rejected the Government's argument that the more data retained, the more crime prevented: "accepting such an argument in the context of a scheme of indefinite retention would in practice be tantamount to justifying the storage of information on the whole population and their deceased relatives, which would most definitely be excessive and irrelevant".[94] The Government's scheme of data retention was "indiscriminate": it resulted in the indefinite retention of the data of offenders, even in circumstances where their convictions were spent, "without reference to the seriousness of the offence or the need for indefinite retention and in the absence of any real possibility of review".[95] That failed to strike the right balance between the competing public and private interests.[96]

---

90 *Gaughran v United Kingdom* ECHR 45245/15, 13 February 2020.
91 At [65].
92 At [70].
93 At [70].
94 At [89].
95 At [96].
96 At [96].

[95] It is interesting to note that ss 34 and 34A of the Policing Act provide the kind of definitive safeguard that the European Court found to be lacking in the English system that it reviewed in *Catt*. They require identifying particulars to be destroyed if proceedings are not commenced or, having been commenced and concluded, the offence has not been established. Indefinite retention of the kind criticised in *Gaughran* is not contemplated by the New Zealand statute unless the offence for which particulars were taken results in proceedings which are completed with an outcome specified in s 34A.

[96] More importantly, however, the statutory regime does not authorise the retention of photographs taken in circumstances where the police have suspicions but decide not to commence a prosecution in respect of the circumstances giving rise to the taking of the photograph. While the present facts do not disclose a "decision" not to prosecute, that can be inferred.

[97] For all these reasons we have concluded that the taking and retention of the photographs was not lawful because it was not authorised by statute. It also breached Mr Tamiefuna's right to be secure against unreasonable search and seizure protected under s 21 of the Bill of Rights Act.

Improperly obtained evidence

[98] The retention of the images subsequently enabled the police to draw a match with the clothing worn by Mr Tamiefuna on the night of the robbery and afterwards at the service station. They were therefore crucial evidence linking him to the aggravated robbery of Mr Lim. They were strongly influential in the Judge's reasoning finding Mr Tamiefuna guilty.

[99] Our conclusion that the evidence was obtained as a result of an unreasonable search and seizure means that it was improperly obtained for the purpose of s 30 of the Evidence Act. This follows from s 30(5)(a) of the Evidence Act, which provides that evidence is improperly obtained if obtained in consequence of a breach of any enactment or rule of law by a person to whom s 3 of the Bill of Rights Act applies. That requires us on appeal to consider whether the evidence should have been

excluded under s 30(2)(b) of the Evidence Act, on the basis that exclusion would be proportionate to the impropriety. The proportionality assessment involves, under s 30(2)(b), giving "appropriate weight to the impropriety" while taking "proper account of the need for an effective and credible system of justice". It is to be informed by the matters set out in s 30(3), namely:

> (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.

[100] Of those considerations, paras (a)–(d) are most relevant. As to para (a), we consider the right breached to be an important one. The random use of photography by police justified by the fact that an image obtained might subsequently be useful is not appropriate unless a particular crime is being investigated. Having said that, we would not characterise the intrusion on Mr Tamiefuna's right as a very serious one; as we have noted above, the facts that the photographs were taken in public and without objection moderate the intrusion on privacy interests.[97]

[101] Turning to para (b) we think it likely that DS Bunting would not have been aware that he was breaching Mr Tamiefuna's rights, and we would not characterise the impropriety involved as deliberate, reckless or done in bad faith. A different

---

[97] Above at [70].

conclusion might in future be justified if police continue to take photographs of persons in circumstances not properly authorised by law.

[102] In terms of para (c), the evidence was real and important and led to Mr Tamiefuna's conviction for a serious offence (relevant under para (d)). The evidence was also clearly central to the Crown's case; reliance on photography was far superior to memory with respect to what Mr Tamiefuna was wearing on the night. We see little room for the application of paras (e)–(h) of s 30(3) in the circumstances of this case.

[103] The need for an effective and credible system of justice is not a consideration that invariably favours the admission of improperly obtained evidence, but it clearly does so here given our conclusions about the seriousness of the intrusion and the nature of the impropriety.

[104] For these reasons, we are satisfied that the evidence should not have been excluded. There is no doubt that if the evidence was admissible, Mr Tamiefuna was properly convicted, and the conviction appeal must be dismissed accordingly.

The sentence appeal

[105] Davison J sentenced Mr Tamiefuna to a term of imprisonment of four years and 11 months.[98] In doing so he took a starting point of six years' imprisonment and applied an uplift of 12 months to reflect Mr Tamiefuna's previous convictions.[99] He then applied discounts for personal mitigating factors (15 per cent), steps taken to reduce trial duration and save court resources (10 per cent), and remorse and prospects of rehabilitation (five per cent). These discounts, totalling 30 per cent on the adjusted starting point resulted in the sentence of four years and 11 months' imprisonment.[100]

[106] Because Mr Tamiefuna was to be sentenced for a stage-2 offence under s 86C of the Sentencing Act (part of what has become known as the "three strikes"

---

98 High Court sentencing notes, above n 2, at [52].
99 At [42] and [44].
100 At [45]–[48].

sentencing regime), the Judge felt obliged by s 86C(4)(a) to order that he serve the sentence without parole.[101]

[107] The sentence appeal is advanced on the basis that the Judge gave an inadequate discount for personal and cultural factors. Ms Gray submitted that a more appropriate discount would have been in the region of 25 to 30 per cent, as opposed to the 15 per cent allowed. The second ground of the sentence appeal focuses on the order made under s 86C(4), and is advanced on the basis discussed in this Court's judgment in *Matara v R*.[102]

[108] We note that the sentence appeal was out of time by nearly two months. The Crown did not oppose extension of the time for appeal and we accordingly grant it.

Discount for personal and cultural factors

[109] Mr Tamiefuna did not cooperate so as to enable a pre-sentence report to be provided, but the Judge had the benefit of a report prepared under s 27 of the Sentencing Act for sentencing in the District Court for unrelated offending. This report recorded that Mr Tamiefuna had been cared for by foster parents as a young person. An attempt to establish a relationship with his biological mother was unsuccessful; he never knew his father. His foster father introduced Mr Tamiefuna to cannabis at the age of 13 and he became a regular consumer of alcohol from the age of 16. He used methamphetamine when introduced to it by his ex-partner. His alcohol use increased after his only brother died unexpectedly in 2013, and this was exacerbated by the death of his foster father later the same year. At the age of 16 Mr Tamiefuna joined the Crips gang, which became what the Judge described as a substitute family. A life of crime seems to have followed in accordance with a common pattern, with the result, as the Judge put it, that Mr Tamiefuna became institutionalised in the prison system.[103] Aged 28, he had an extensive list of previous convictions, including three for aggravated robbery, and one for burglary.

---

101 At [49].
102 *Matara v R* [2021] NZCA 692.
103 High Court sentencing notes, above n 2, at [45].

[110] Ms Gray submitted that Mr Tamiefuna's mitigating personal circumstances were as significant as those in *Solicitor-General v Heta* where a discount of 30 per cent had been allowed.[104] She contended that the discount of only 15 per cent was too low and a discount within the range of 25–30 per cent should have been allowed.

[111] Ms Becroft for the Crown acknowledged that Mr Tamiefuna has had an upbringing that is coloured by cultural alienation, family neglect and trauma, and drug and alcohol abuse. But she submitted that the discount given was within range.

[112] For our part we do not accept that the array of factors to which Mr Tamiefuna could point were as serious as those discussed in *Heta*, and we do not consider that the Judge's approach can be said to be wrong. While other judges might have allowed a greater discount, we agree with Ms Becroft that the Judge's approach, subject to what we say below, did not result in a sentence that was excessive. We are not persuaded by this ground of appeal.

Disproportionality

[113] The second ground of the sentence appeal rests on the order made by the Judge that Mr Tamiefuna serve the sentence of four years and 11 months' imprisonment without parole, in accordance with s 86C(4) of the Sentencing Act. Here Ms Gray relied principally on this Court's judgment in *Matara v R* in which the Court applied an analysis to second strike offences similar to that carried out by the Supreme Court in *Fitzgerald v R* in respect of third strike offences.[105] The object is to ensure that sentencing does not result in a sentence that is disproportionately severe in breach of s 9 of the Bill of Rights Act.

[114] Mr Fitzgerald was convicted of a low-level indecent assault, which would not have attracted a term of imprisonment without aggravating circumstances relating to the offender.[106] However, because it was a third strike offence, the Judge felt obliged to impose the seven year maximum term of imprisonment in accordance with s 86D

---

104 *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241.
105 *Matara v R,* above n 102, applying *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551.
106 *R v Fitzgerald* [2018] NZHC 1015 at [21].

of the Sentencing Act.[107] The Supreme Court held that this was disproportionately severe in breach of s 9.[108] The majority held that it was necessary and possible to interpret s 86D(2) so that it did not require the imposition of sentences with that consequence.[109]

[115] In *Matara*, this Court held that a similar approach was appropriate for second strike offending. The Court said:[110]

> [59] The reasoning of the Supreme Court in relation to third strike sentencing in *Fitzgerald* is equally applicable to second strike sentencing. There is no express provision in s 86C, or elsewhere in the three strikes regime, to require that Judges impose sentences inconsistent with s 9 of NZBORA. The interpretive direction in s 6 of NZBORA, the principle of legality, and the presumption of consistency with international obligations all apply with equal force in relation to s 86C(4). Very clear language would be needed before reading s 86C as a direction by Parliament to the judicial branch that it should impose sentences inconsistent with NZBORA, and with New Zealand's international obligations. In the absence of such language, s 86C(4) should not be read as requiring the judicial branch to impose such sentences.

[116] This meant that s 86C(4) is to be read subject to an unexpressed qualification that an order should not be made under it if to do so would be inconsistent with s 9 of the Bill of Rights Act. This is a high threshold, that has been expressed as requiring treatment "so excessive as to outrage contemporary standards of decency", or "treatment grossly disproportionate to the circumstances or such as to shock the national conscience".[111] In that case the consequence of the order was to require Mr Matara to serve a sentence of 10 years and two months' imprisonment without parole, when the sentencing Judge held that, but for s 86C(4), a non-parole period of 40 per cent would have been imposed. The Court considered that the additional six years of non-eligibility for parole, not rationally connected to any of the relevant sentencing principles in the Sentencing Act, constituted a grossly disproportionate outcome.[112]

---

107 At [17].

108 *Fitzgerald v R*, above n 105, at [79]–[81] per Winkelmann CJ, [167] per O'Regan and Arnold JJ, [239] per Glazebrook J and [283] per William Young J.

109 At [139] per Winkelmann CJ, [219] per O'Regan and Arnold JJ and [250] per Glazebrook J.

110 *Matara v R,* above n 102.

111 At [72], citing *Fitzgerald v R*, above n 105, at [163]–[166] per O'Regan and Arnold JJ, referring to the approaches adopted by the Supreme Court in *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [91]–[92] per Elias CJ, [176] per Blanchard J and [288] per Tipping J.

112 At [75].

[117] In the present case, the Judge said that, were it not for the provisions of s 86C of the Sentencing Act, he would not have imposed a minimum term of imprisonment.[113] That would have meant Mr Tamiefuna would have been eligible to be considered for parole after serving the standard period of one third of the sentence of imprisonment. This would have meant he was eligible for parole after serving a little under 20 months. Instead, he is obliged to serve the full sentence of 59 months, an effective tripling of the time required to be spent in prison. In *Matara* the effect of the s 86C(4) order was to increase the length of time before parole eligibility by about 150 per cent, and this was considered grossly disproportionate. Here the difference is just shy of 200 per cent.

[118] Ms Brook conceded that the result was severe, but argued it was not disproportionately so. She highlighted the absence of mental health considerations in this case such as those which were influential in *Fitzgerald* and *Matara*. She also pointed to Mr Tamiefuna's first strike offence, also an aggravated robbery, as being serious. Mr Tamiefuna was also not someone who had been "inadvertently captured" by the three strikes regime; he had many previous convictions, including for two other aggravated robberies he committed before the enactment of the three strikes regime.

[119] Since the Supreme Court's decision in *Fitzgerald*, this Court has on a number of occasions considered appeals claiming that sentences imposed under the three strikes regime breached s 9 of the Bill of Rights Act.[114] We summarised the recent case law of this Court in our decision in *Allen v R*.[115] Of particular relevance here is the decision in *Crowley-Lewis v R*.[116] In that case, the appellant was sentenced to nine years' imprisonment without parole for a representative charge of rape. This Court quashed that sentence, together with the order that the appellant serve it without parole, and resentenced the appellant to eight years and six months' imprisonment with a minimum period of imprisonment of four years and three months. It found that requiring the appellant to serve the full term of imprisonment —

---

113 High Court sentencing notes, above n 2, at [50].

114 *Phillips v R* [2021] NZCA 651, [2022] 2 NZLR 661; *Mitai-Ngatai v R* [2021] NZCA 695; *Crowley-Lewis v R* [2022] NZCA 235; *Sheers v R* [2022] NZCA 618; *Love v R* [2022] NZCA 614; and *Allen v R* [2022] NZCA 630.

115 *Allen v R*, above n 114, at [21], [27] and [30].

116 *Crowley-Lewis v R*, above n 114.

involving a 100 per cent increase in the length of time before parole eligibility — would be disproportionate and would breach of s 9 of the Bill of Rights Act. The disproportionality which was of concern to this Court in that case was less than is present in respect of Mr Tamiefuna's sentence.

[120] Aside from his drug and alcohol issues, we accept Mr Tamiefuna has not been diagnosed with any mental health issues, which were an important consideration in *Fitzgerald* and *Matara*. However, there was also no suggestion that the appellant in *Crowley-Lewis* had been diagnosed with any mental health issues. The absence of such issues is not decisive to the s 9 inquiry. It is nevertheless the case that Mr Tamiefuna came from a disadvantaged background which contributed to his offending. His background demonstrates the importance of him being able to access rehabilitative support, a consideration that the Judge emphasised in allowing a five per cent reduction to encourage him to continue to develop insights into and understanding of the reasons for his offending. Those insights had been reflected in a letter written to the Court at the time of sentencing. That sort of outcome would be hampered by the maintenance of the non-parole order.

[121] In sum, the disparity between the sentence resulting from the s 86C(4) order is so great that we are satisfied the sentence was disproportionately severe. We add that this conclusion implies no criticism of the Judge who sentenced Mr Tamiefuna prior to this Court's decision in *Matara*.

Result

[122] The appeal against conviction is dismissed.

[123] The application to extend the time for bringing the sentence appeal is granted.

[124] The sentence appeal is allowed to the extent that the order made pursuant to s 86C(4)(a) of the Sentencing Act is set aside. The sentence of four years and 11 months' imprisonment remains in place.

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