

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN
[SQUARE BRACKETS].

**IN THE DISTRICT COURT
AT WELLINGTON**

**CRI-2013-085-11712
[2016] NZDC 3108**

THE QUEEN

v

**HIEP PHAM
PAUL BEVERIDGE**

Hearing: 23 February 2016

Appearances: Mr Winsley for Crown
Ms Dhyrberg for Pham
Mr Stevenson for Beveridge
Mr Murray for New Zealand Customs (Non Party)

Judgment: 8 March 2016

**RESERVED DECISION OF JUDGE I G MILL
(NON PARTY DISCLOSURE)**

[1] The defendant Hiep Pham is charged with importing methamphetamine, conspiracy to supply methamphetamine and possession of methamphetamine.

[2] His co-defendant Paul Beveridge is charged with importing methamphetamine, conspiracy to supply methamphetamine, supplying methamphetamine and possession of methamphetamine for supply.

[3] The non-party disclosure hearing was adjourned having stalled on an initial point, itself relating to a disclosure. New Zealand Customs (as the Non Party) resist disclosure of all the reasons for not disclosing the information sought.

[4] Ms Dhyrberg for Mr Pham has applied for disclosure of documents and information relating to a tracking device installed by New Zealand Customs and used to track a package that had contained over 2kg of methamphetamine from [address 1 deleted], Lower Hutt, to Wellington, then to [address 2 deleted], Tawa and subsequently to [address 3 deleted], south of Levin. Most of the evidence about the tracking device comes from [the investigator], an investigator for New Zealand Customs Service, Drugs and Prohibited Goods Unit based in Wellington. His evidence was that a tracking device was installed in the package on Monday 14 October 2013 and [the investigator] was tasked to assist the technician who was monitoring the package.

[5] The identity of the technician is unknown.

[6] At 11:14 am on 15 October 2013 the package, now containing a small amount of methamphetamine and a large amount of placebo was delivered to [address 4 deleted], Fairfield, Lower Hutt.

[7] [The investigator]'s evidence is that at 2.19pm he saw a Blue Nissan Sunny rental vehicle leave [address 1 deleted]. Information received from the technician indicated that the package was inside the vehicle. He received several further reports detailed later in this decision.

Evidence of Interception and Delivery of Package

[8] The Crown evidence is that the package was intercepted by Customs at Auckland International Airport on 10 October 2013. It was sent from Hong Kong and addressed to Michael Chang, [address 4 deleted], Lower Hutt. The package was declared to be a "sample electronic advertising lightbox".

[9] The contents of two bags weighing approximately two kilograms wrapped in tinfoil and found within the package tested positively for methamphetamine.

[10] All but 5.4 grams of the methamphetamine was replaced with a placebo and the material was repackaged to look like the original. On 14 October 2013 tracking devices were installed into the pack.

[11] A Customs officer delivered the package to [address 4 deleted], Lower Hutt where it was received by an elderly woman [the witness]¹

[12] [The witness]' neighbour was Khanh Nguyen, also charged in respect of the importation [but now a sentenced prisoner].

[13] The witness]' evidence was that she was befriended by Mr Nguyen and his wife who had lived at [address 1 deleted] for several years.

[14] She agreed to receive a package on their behalf as they were busy working during the day.

[15] Mr Nguyen's evidence is he agreed with Mr Pham to receive the package for financial reward.

[16] He obtained the package from [the witness] and put it on to his own property.

[17] His evidence is on instructions from Mr Pham he hired a rental car from [a rental company]. He put the package into the boot of that car, whilst it was on his property at [address 1 deleted].

Transporting the Package from [address 1 deleted] to [address 3 deleted]

[18] The Police had been observing Mr Nguyen's property between 11 and 16 October 2013. On 15 October 2013 Mr Nguyen was seen to visit [address 4

¹ See evidence of [3 named Customs Officers]

deleted] and to go to the rear of that property. He was seen driving the Nissan Sunny vehicle in reverse down his driveway at [address 1 deleted].

[19] The boot was open.

[20] This vehicle was observed leaving [address 1 deleted] at around 2:35 pm. Mr Nguyen was the only occupant.

[21] Mr Nguyen's evidence is he had rung Mr Pham and told him the package had arrived and asked that someone come to get it. Mr Pham instructed him to bring it to him in town.

[22] They were to meet at a car park on Bowen St in Wellington.

[23] Mr Nguyen says that car park was full so he went to a nearby Wilson's car park.

[24] On arrival he rang Mr Pham who originally said he would get someone to take the rental car.

[25] That changed and it was arranged that Mr Nguyen would meet Mr Pham and the parcel would be transferred into Mr Pham's BMW car.

[26] Mr Nguyen says the package was put into the boot of this car and Mr Nguyen returned the rental car. Mr Pham was to drop him home.

[27] When he returned the car he filled it with petrol at the request of the rental company. CCTV evidence shows Mr Nguyen filling the car with petrol.

[28] The two men then travelled from the rental company in the BMW along Hutt Rd, Kaiwharawhara heading towards Petone. They didn't go to Petone but drove to Mr Pham's home in Tawa where Mr Nguyen waited in the study.

[29] Someone arrived at the property but Mr Nguyen remained in the study and did not see what transpired.

[30] He was then taken home by Mr Pham this time in an SUV rather than the BMW sedan they had arrived in.

[31] The Police had observed the Nissan rental vehicle on Whitmore St, Wellington with Mr Nguyen the only occupant and also when it drove to [the rental company, address deleted].² The Police saw Mr Nguyen come out of [the Rental Company] and get into a black BMW sedan registered [registration number deleted] waiting outside.

[32] This vehicle was observed as it drove to Tawa on State Highway 1 then down Larson Crescent and right into Kiwi Crescent. The car then did a u-turn, parked on Kiwi Crescent just back from the intersection with Larson Crescent.

[33] Mr Nguyen and Mr Pham then walked across [name of street deleted] towards [address 2 deleted], Mr Pham's address, directly opposite where the BMW was parked.³

The Mercedes Benz

[34] About 6 pm Customs Officer, [the investigator] was advised that a silver Mercedes Benz vehicle registered [registration number deleted] was driving away from Kiwi Crescent in Tawa heading towards Porirua.

[35] This vehicle had been seen by [Constable A] parked right behind the BMW on Kiwi Crescent at around 5:50 pm.

[36] The information given to [the investigator] by the technician was that the package was now in the Mercedes 4x4 motor vehicle. The Crown allege Mr Beveridge was the driver.

[37] [Constable C] observed the vehicle driving towards Porirua. He then saw it stop at Burger King in Porirua and the driver get out. [Constable D] saw him return

² [Constable A]

³ [Constable B]

to the vehicle about 6:24 pm and drive on State Highway 1 and then turn off into Riverbank Rd at the south end of Otaki and continue out of sight near Kirk St.

[38] At about 7:15 pm [Constable B] saw the Mercedes come back on to State Highway 1 at Otaki and later turn left on to Muhunua West Rd at Ohau.

[39] [Constable D] observed the vehicle driving east towards State Highway 1 on Muhunua West Rd at about 7:28 pm.

[40] [Constable E] saw the vehicle driving on Kuku Beach Rd at about 7:36 pm.

The Tracking Evidence

[41] [The investigator] received information from a technician who was monitoring the tracking device. [The investigator] himself had observed the package being delivered to [address 4 deleted], Lower Hutt at 11:14 am. He saw the Nissan rental car drive past him as he received information from the technician that the package was inside the vehicle. That was around 2:19 pm.

[42] At 3:57 pm he saw the BMW sedan drive past him on Thorndon Quay and proceed along Old Hutt Rd towards Ngauranga Gorge. There were two occupants in the vehicle.

[43] Information from the technician at that time indicated the package was in that vehicle.

[44] At 4:13 pm he received information from the technician indicating the package was in the vicinity of Kiwi Crescent, Tawa and at about 6:00 pm that the package was inside a silver Mercedes vehicle registration [registration number deleted] driving away from Kiwi Crescent. At around 7:55 pm information from the technician indicated the package was in Kuku Beach Rd.

The Search and Arrests at [address 3 deleted]

[45] On 16 October 2013 at around about 12:45 pm the Police arrived at [address 3 deleted], Manukau. Paul Beveridge was located in the driveway and advised that the Police were searching the property for methamphetamine pursuant to s 20 of the Search and Surveillance Act 2012.

[46] Mr Beveridge's brother was located in the lounge.

[47] The silver Mercedes and the black BMW sedan observed the previous day were at the property.

[48] Mr Pham is the registered owner of both vehicles.

[49] Mr Pham was located in the corner of the lounge covered by various items.

[50] A package was found in a bedroom and cardboard packaging on the floor there and also between the lounge and the kitchen. Both Mr Beveridge and Mr Pham were arrested.

[51] The package and its remnants found at Kuku Beach was the same package intercepted by Customs and delivered to [address 4 deleted], Lower Hutt.

[52] Parts of the packaging were located in a lounge and also a bedroom. On a table in the bedroom where some of the packaging was found was a pair of scissors, a green mug, a glass tumbler, a radio frequency detector, a black handled knife and a pair of used rubber gloves.

[53] Mr Pham's wallet was found in the bedroom.

[54] Fingerprint evidence puts Mr Pham at the table where the package appears to have been unwrapped.

The Application

[55] With these facts in mind Ms Dhyrberg for Mr Pham has challenged the evidence relating to the information received from the tracking devices to the technician and relayed to Mr Cunliffe.

[56] She seeks copies of notebook entries, job sheets and records from the person who installed and uninstalled the device together with that person's identity. She also seeks the specifications of the tracking device and monitoring equipment used. She seeks the redacted portions of several documents including those from the affidavit of [the deponent] sworn in relation to the non party disclosure hearing.

The Hearing

[57] At the hearing I heard evidence from [the deponent], the deponent of two affidavits sworn in support of Customs NZ and their objection to revealing the reasons for them not wanting to disclose the information sought.

[58] Her first affidavit was disclosed to the Crown and to the defence.

[59] Her second affidavit of the same date was more extensive and not disclosed and contained italicised paragraphs which were in addition to those in the first affidavit.

[60] In the shorter affidavit there was no indication as to where these paragraphs were inserted. The first affidavit is referred to as the "redacted affidavit" and the second the "unredacted affidavit".

[61] When I questioned [the deponent] on the contents of her unredacted affidavit I did so in the absence of counsel for the Crown and counsel for the defence. Mr Murray, who appeared for New Zealand Customs, was present.

[62] A record of her evidence has been transcribed but has been sealed for my eyes only.

[63] The question for me to address is should I direct disclosure of the unredacted affidavit or parts thereof during my determination of whether the documents and information sought should be disclosed.

[64] In that regard I received helpful submissions from counsel for New Zealand Customs and the defendant. The defendant's submission is essentially that it should be disclosed and if there is sensitive information to be disclosed then there should be conditions or counsel should be appointed to view the affidavit and make submissions to me.

The Law

Legal basis for withholding reasons for non-disclosure

[65] Following a non-party disclosure hearing a judge may order the non-party to disclose all or part of the information sought, subject to any conditions, if the judge is satisfied that the information is relevant and the disclosure is necessary in the public interest.⁴

[66] A judge may refuse to order disclosure of the information or part thereof if the judge is satisfied that any of the reasons described in s 16 or s 18 for which information could be withheld apply to the information.⁵

[67] Mr Murray, counsel for New Zealand Customs, submits:

The reason for the redactions is that there is information in the full affidavit which is intrinsically linked to reasons for withholding documents from disclosure. Customs do not consider the full affidavit can be released to the parties without compromising the underlying basis for withholding the documents from disclosure.

[68] Accordingly, while a non-party can utilise the reasons listed in s 16 as a mechanism to withhold information the issue is whether a non-party is entitled to redact the grounds in support of those reasons.

⁴ S 29(1) Criminal Disclosure Act 2008

⁵ S 29(2)(a) Criminal Disclosure Act 2008

[69] A prosecutor must disclose to a defendant information that is relevant and if relying on s 16 to refuse to supply that information must list the relevant information together with any reasons for refusal and “if the defendant so requests, the grounds in support of that reason unless giving of those grounds would itself prejudice the interests protected by s 16”.⁶ In this case New Zealand Customs is not the prosecuting agency. Sections 24-29 of the Act set out the disclosure regime governing non-parties and do not refer to s 13.

[70] Nor do ss 24-19 include an equivalent withholding provision as found in s 13(2)(b)(ii).

[71] Notwithstanding this, Mr Murray submits:

It would be an anomaly if a judge were conferred statutory authority to consider a non-party’s submission that s 16 withholding grounds apply to materials, or part thereof, but not, at the same time, consider the availability or relevance of related procedural provisions and protections applicable to such material, such as those provided in s 16(2) and s 13(2)(b)(ii).

[72] I agree with that submission.

[73] Section 29 allows a non-party to invoke the reasons listed under s 16 to withhold information. If a non-party’s grounds in support of those reasons would themselves prejudice the interests protected by s 16 then to conclude that the court did not have the ability to deal with this on the grounds appearing in s 16 would be to defeat the purpose of s 29(2)(a).

[74] This would also be contrary to the purpose of the Act, which is to “promote fair, effective and efficient disclosure of relevant information between the prosecution and the defence and by non-parties.”⁷ The reasons under s 16 claimed by New Zealand Customs in this case for not disclosing are:

⁶ S 13(2)(b)(ii) Criminal Disclosure Act 2008

⁷ S 3(1) Criminal Disclosure Act 2008

- (a) Disclosure of the information is likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences.⁸
- (b) Disclosure of the information is likely to endanger the safety of any person.⁹
- (c) The information is analytical or evaluative material prepared in connection with an investigation that led to the defendant being charged.¹⁰
- (d) The disclosure would be likely to prejudice the security or defence of New Zealand or the international relations of the government of New Zealand.¹¹
- (e) The disclosure of the information would likely facilitate the commission of another offence.¹²

[75] The unredacted affidavit adds one more ground under paragraph 7.5.

[76] The reasons for withholding the information are expanded in the unredacted affidavit where there are 14 additional paragraphs and two further paragraphs are expanded.

[77] Those redacted paragraphs and part-paragraphs are essential to a proper consideration of the claim to withhold the information relating to tracking devices.

[78] [The deponent]'s evidence given before me also assists in that analysis.

[79] The concern expressed by her is that these passages themselves give away information about the technology and methodology used by New Zealand Customs

⁸ S 16(1)(a) Criminal Disclosure Act 2008

⁹ S 16(1)(b) Criminal Disclosure Act 2008

¹⁰ S 16(1)(c)(iii) Criminal Disclosure Act 2008

¹¹ S 16(1)(g)(i) Criminal Disclosure Act 2008

¹² S 16(1)(h) Criminal Disclosure Act 2008

Services which isn't readily available. New Zealand Customs would be concerned about releasing it.

[80] [The deponent] went on to give more detailed explanations once counsel was excluded.

[81] I agree that some of the information in the unredacted affidavit could assist persons importing or conspiring to import drugs to anticipate or infer what steps could be taken by New Zealand Customs and how they would achieve those, particularly in relation to tracking devices. In that way I agree that disclosure of some of the information is likely to prejudice the maintenance of the law including the prevention, investigation and detection of offences.

[82] On the other hand, some of the redacted information does not fall into that category and, subject to some conditions relating to the remainder, I find it necessary to disclose that information as it will assist the defendant to properly advance the application for disclosure and provide a fair hearing of this application.

Ruling

[83] With the exception of s 16 in the unredacted affidavit, (for reasons given in the confidential evidence of [the deponent]) I rule that the unredacted affidavit, apart from that paragraph, shall be supplied to counsel for the Crown and counsel for Mr Pham on the following conditions.

- (a) No copy is to be made of the affidavit.
- (b) No copy is to be shown to any person, including the defendants, without leave of a judge.
- (c) The contents of the affidavit are not to be disclosed to any other person or the defendant without leave of a judge.

[84] Upon completion of the hearing relating to non-disclosure the copy must be returned to the court, "For the attention of Judge Mill", in a sealed envelope.

The application for disclosure

[85] The hearing in relation to disclosure of the information itself is not finished.

[86] Counsel are to advise the registrar by 30 March 2016 whether they wish to appear in person to make oral submissions or call evidence at the resumed hearing under s 27 or whether they wish to submit written submissions for my consideration and for a decision to be made.

IG Mill
District Court Judge