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

UNDER THE SEARCH AND SURVEILLANCE ACT 2012
SS 72, 73, 88 AND 125

IN THE DISTRICT COURT
AT AUCKLAND

CRI-2017-004-003394
[2018] NZDC 3728

THE QUEEN
Prosecutor

v

[KIUGA SIULAI]
Defendant

Hearing: 27 February 2018

Appearances: E Mok for the Crown
P Stokes for the Defendant

Judgment: 2 March 2018

DECISION OF JUDGE P A CUNNINGHAM
[On admissibility of defendant's cellphone data]

The charges

[1] The defendant [Kiuga Siulai] is charged with aggravated robbery and threatening to kill as a result of an incident on [date deleted] 2017 at or about 5.55pm. The formal written statement of [the complainant] says that she phoned [her friend] asking her to give her lift home and that [the complainant's friend] responded that she would arrange a ride home for [the complainant]. The allegations are that the defendant picked up the complainant in his car at [address 1 deleted] to take her to [address 2 deleted]. The incident took place in the car of Mr [Siulai].

The Crown case

[2] [The complainant] describes being picked up in a white Mitsubishi station wagon registered number [details deleted] by a male. She directed him to go to [address 2]. She says he then turned to her and said "actually I am here to take all your shit". She thought it was a joke and said "I've got nothing". He said to her "I don't give a fuck bitch put all your shit in the back"

[3] She said he pulled a knife that was underneath his right leg which was 15-20 centimetres long with a black wooden handle which he held in his right-hand in a threatening manner. She then leaned through the middle of the car and put her belongings on the rear passenger seat. He then told her to empty out her pockets. At this time he changed the knife to his left-hand and hit her in the middle of the chest with the base of the handle. She said I don't have any pockets, I have nothing and he said "I am going to kill you bitch".

[4] As they turned into [street name deleted] she saw a man named [witness 1] (who she knew) in a driveway. She screamed out to him at the same time pulling the handbrake up. The car skidded in the middle of the road. She said "[Witness 1] help me, help me, this guy is gonna kill me". [Witness 1]walked towards the car. [The complainant] grabbed the knife from the driver's lap and he tried to grab it from her. [Witness 1] stepped back at this point. She then said "get me out of here, I can't open the door". She said the male grabbed the knife and yelled "fucking get out!" and unlocked the door. He hit her again. She grabbed the door handle and it opened. She ran to the nearest house at [address deleted].

[5] When spoken to by the police she gave a description of the man including what he was wearing and her property that was left in the car. At 7.50pm that evening she was shown a montage of eight photographs and she identified Mr [Siulai] as the driver of the car.

[6] The police also have evidence from [witness 2] who will say that he heard a woman saying help me, help me, he won't let me out of the car. This was outside his house. He ran inside to get his landline phone. When he came outside the woman was

standing outside on the footpath and he dialled 111 and gave the phone to her. He gave a description of the driver.

[7] Mr [Siulai] was spoken to by the police in the early hours of 2 April 2017. He admitted that he was called by a friend and told to collect the victim. He stated that she placed her belongings on the rear seat. He stated that he was following her directions but he could not hear her properly and that she freaked out because of this. He stopped the car and asked for the money she owed and that she ran away leaving her property behind. A meat clever was located in Mr [Siulai]'s car and it was seized as an exhibit.

The cellphone evidence

[8] The Crown seeks to admit the evidence obtained from the defendant's cellphone. They are text messages said to be between the defendant and [the complainant's friend], who the complainant says is the friend she asked for a lift home. The one who said that she would arrange a ride for her.

[9] The text message exchanged between 13.23:51 and 13.26:31 is set out below. [messages deleted.]

[10] The Crown submits that this a conversation between the defendant and [the complainant's friend] the day before discussing a plan to rob the complainant of her "money and gear".

[11] There is a formal written statement from [Officer 1] who is a Detective Constable within the New Zealand Police. She was asked to go and speak to the defendant regarding an aggravated robbery in the early hours of the morning of 2 April 2017.

[12] [Officer 1] conducted a DVD interview with Mr [Siulai] at the end of which she told him that he would be charged with aggravated robbery. At 4.50am she escorted Mr [Siulai] back to the custody suite.

[13] She was aware that there were two cellphones in his property and she said that she intended to seize the two cellphones under s 88 of the Search and Surveillance Act 2012 ("SSA"). [Officer 1] said that she believed there was evidential material on the cellphones relating to the aggravated robbery as the victim had contacted a friend to arrange transport to her home address and that the friend had organised the transport on behalf of the victim. The officer states in the application for a production order that this was organised through a cellphone.

[14] The Crown accepts that the defendant's cellphones were initially taken from him because he was to be placed in police custody and not because the cellphones were considered to contain evidential material.

[15] At 11.30pm that night [Officer 1] seized the two phones under s 88 of the Search and Surveillance Act which section allows the police to search items in a person's possession if it is evidential material relating to the offence in respect of which the arrest is made or the person is detained (see s 88(2)(c) of the SSA. She turned the phones on and used her police New Zealand iPhone to call the number provided by Mr [Siulai] but the phone did not ring. She then told Mr [Siulai] that she was seizing the two phones under the SSA.

[16] On 12 April [Officer 1] seized the phones from the Auckland Property and Exhibit Store and examined them to obtain the sim and IMEI numbers from the phone and recorded them in her notebook. She returned the phones to the Property and Exhibit Store. On 19 April she applied for a production order and on 21 April received the results from a person at Vodafone.

Submissions

[17] The Crown accepts that there was no lawful authority for the police to seize the cellphones under s 88 SSA as they were no longer in the possession or control of Mr [Siulai] when s 88 was invoked. Because s 88 did not apply there was no authority under s 125 of the SSA for the police to search the cellphones for the purpose of obtaining the sim and IMEI information from them.

[18] Further the Crown accepts that the production order was obtained in reliance of the information gathered from the improper seizure and search of the phones. However the Crown submits that the proposed evidence is nevertheless admissible pursuant to the balancing exercise under s 30 of the Evidence Act 2006.

[19] Ms Stokes for Mr [Siulai] submits submitted that there was not a proper basis for [Officer 1] to state that there was evidential material on the cellphones relating to the aggravated robbery because of a statement made by Mr [Siulai] in his interview. At page 26 of the transcript of the electronically recorded interview with Mr [Siulai] he said:

> I just got sent the address, ah I just got told the address and then I looked it up and then I just went there and I happened to see her sitting there and I asked her and she was like oh yeah and she just jumped in like yeah.

Thus Ms Stokes submitted that initially Mr [Siulai] said that he was sent the address and then he corrected himself and said he was told the address.

[20] However the officer's formal written statement refers to what the victim said rather than what Mr [Siulai] said.

[21] Ms Stokes also submitted that the police could have used details on the complainant's phone to ascertain the phone number of [the complainant's friend] and to seek a production order of her cellphone messages rather than to seize and obtain a production order of Mr [Siulai]'s cellphone.

Crown – s 30 balancing factors

[22] The Crown submits that the following matters favour inclusion:

(a) that the conversation discusses a plan to rob the complainant of her money and gear and that it is highly probative of one of the key issues at trial, namely whether the defendant had an intention to rob the complainant of her property;

(b) that aggravated robbery is a serious offence;

(c) in terms of the nature of the proprietary that this was an error and therefore at a low level in terms of seriousness which should be treated as a neutral factor. Further that there were reasonable grounds for [Officer 1] to believe that Mr [Siulai]'s cellphones would contain evidential material relevant to the alleged offending. The police would have had grounds to obtain a search warrant for the defendant's cellphones in the circumstances;

(d) the police could have obtained this evidence in any event by asking the complainant to provide [the complainant's friend]'s contact details.

[23] The Crown submitted that the following matters weighed in favour of exclusion, namely:

(a) the intrusion on the right to be free from unreasonable search and seizure as set out in s 21 of the New Zealand Bill of Rights Act. Further that accessing electronic devices may involve the intrusion on privacy interests but submitted that in this case it fell at the lower end of the spectrum of seriousness;

(b) that there were other investigative techniques that were available to the police, for example, applying for a search warrant of the cellphones or asking the complainant to provide [the complainant's friend]'s phone number;

(c) the police officer was operating under a mistaken belief that she had the lawful authority to seize and search the phones and did not turn her mind to alternative techniques.

[24] That when the balancing exercise is undertaken while the seizure excluded an intrusion into the defendant's rights, the seriousness of the offending and the nature of the evidence and its probative value to a key issue at trial together with the fact that it may have been well discovered in any event weigh in favour of admission. That the

impropriety was at the lower end of the spectrum in terms of seriousness given that the police were acting in good faith and under a mistaken belief.

Defence – s 30 balancing factors

[25] The defendant submits that Mr [Siulai] had a high privacy interest in the data on his cellphone pursuant to the case of *McLean v R*[1].

[26] That there was no evidence the phones could be considered to have evidential material and that the police had the opportunity to apply for a search warrant to search the phones 10 days after their initial seizure.

[27] The defendant also disputes that there were reasonable grounds to believe that the documents sought constituted evidential material in terms of s 72(b)(i) of SSA because there must be an objective and credible basis for thinking a search will discover the items identified. This is because [the complainant] said she asked [her friend] for a lift home and that [her friend] said she would arrange a ride home. She told me that a friend of hers is outside and ready to pick me up.

[28] In the interview Mr [Siulai] admitted he was called by a friend and told to collect the victim which he did. Thus Ms Stokes emphasised that these were telephone discussions and there was no direct evidence to support the suggestion there were relevant text messages on Mr [Siulai]'s phone.

[29] In summary it was submitted for the defendant as follows:

(i) the right to be free from unreasonable search and seizure is an important right and the production order captured numerous text messages in relation to which the defendant had a reasonable expectation of privacy;

(ii) the police actions in carrying out an unlawful search of the cellphones were deliberate;

[1] [2015] NZCA 101.

(iii) that the statements and the text messages from [the complainant's friend] are hearsay and therefore inadmissible;

(iv) there were other investigatory techniques available, namely to apply for a search warrant or to use another avenue in the investigation including a production order for the complainant's phone in relation to her phone contact with [her friend];

(v) there was no urgency to obtain a warrant to search the phone and there was no urgency in obtaining a production order.

[30] The defendant accepted that aggravated robbery is a serious charge.

My assessment

[31] Section 30(2) of the Evidence Act 2006 says:

> The Judge –
>
> (a) find, on the balance of probabilities, whether or not the evidence was improperly obtained;
>
> (b) if the Judge finds that the evidence has been improperly obtained determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system of justice.

[32] Subs (3) sets out matters which the Court may have regard to in making the balancing assessment. I intend to approach the matter by dealing with all of those factors in turn.

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

[33] In *McLean v R,* Mr McLean was initially arrested on the charge of driving whilst disqualified. The police officer in attendance noticed a television placed in an unusual position in the back of the car, he then opened the boot and saw a laptop as well. During his conversations with Mr McLean he noticed Mr McLean was

surreptitiously sending a text message on his cellphone. Shortly afterwards Mr McLean's cellphone was seized, the officer saying that was done for safekeeping. Mr McLean was then transported to the Hamilton Police Station but before being interviewed the constable removed Mr McLean's cellphone from the storage locker and examined it. It was still switched on and he read a recent text message and other messages on the phone.

[34] At paragraph [32] of *McLean v R* the Court of Appeal said:

> …we accept that Mr McLean had a privacy interest with respect to the cellphone…

[35] At paragraph [50] the Court said:

> The right to be secure against unreasonable search and seizure is an important right. The authorities referred to earlier support the conclusion that the privacy interest which a person has in his or her cellphone can be particularly high. While the breach of Mr McLean's privacy may not have been at the most serious end of the scale, it was nonetheless serious.

[36] Following that decision, I can come to no conclusion other than the importance of Mr [Siulai]'s right to privacy which was breached in this case was serious.

[37] In the *McLean* case, as in this case, the police went on to obtain a production order. It was for 15 days in *McLean* which the Court found was an unreasonable amount of time and going on to say that up to four days would have been a reasonable amount of time. Four days was the duration of the production order obtained by [officer 1] in this case. While the production order was tainted by the unlawful search of the cellphone in the first place, the duration of time was reasonable.

The nature of the impropriety including whether it was deliberate, reckless or done in bad faith

[38] The officer concerned did not give evidence. Paragraph 5.10 of counsel submission stated as follows:

> At no stage in the present case did the police officer believe she was exceeding her powers. As set out in her formal statement, [officer 1] mistakenly considered that she had lawful authority pursuant to ss 88 and 125 of the (sic) Search Act to seize and search the phones.

[39] The officer's formal written statement said as follows:

> 8. At 4.50am I escorted [Siulai] back to the custody suite. At this time I identified two cellphones in his property. I intended to seize the two cellphones in his property under s 88 of the Search and Surveillance Act.
>
> …
>
> 13. At 11.30pm I seized the two phones under s 88 of the Search and Surveillance Act 2012.
>
> …
>
> 15. I turned the phones on and used my police issued iPhone to call the number provided by [Siulai], the phones did not ring.
>
> 16. I informed [Siulai] that I am seizing the two phones under Search and Surveillance Act 2012 and left the documentation in his property.

[40] It is submitted by the Crown that the Police acted in good faith in the present case, and that the errors were not gross or reckless. Accordingly, it is submitted that the impropriety was low-level in terms of seriousness and should be treated as a neutral factor in the balancing exercise.

[41] The police officer was mistaken as to her ability to seize the phones at the point after they were in storage at the police station. I accept that the officer was not acting in bad faith. However that does not mean it was not deliberate or reckless. The unlawful search was a breach of the law and there is evidence that the police officer was mistaken about the law. The SSA is an Act that all police officers must be aware of. To not be aware of the search and seizure powers is not satisfactory. While it falls short of reckless, it is negligent. I am unable to accept the impropriety was low level. It was moderately serious.

(b) The nature and quality of the improperly obtained evidence

[42] There is nothing in the formal written statement of [the complainant] that sheds any light on the text message evidence. This is not surprising given that she gave her statement to the police on the day of the incident and Mr [Siulai] was not arrested until eight days later. The content of the text message data was received by the police on 21 April 2017, [some time] after the incident itself.

[43] Reading the formal written statement of [the complainant] indicates that she initiated contact with [her friend] on [date deleted] 2017. Yet on the Crown's view of the meaning of the text messages from the day before, there was a plan to rob [the complainant] the day before it happened.

[44] This is not a case where the text message evidence is central to the Crown case. The primary evidence is that of the complainant and there is other evidence consistent with what she says happened. As Ms Stokes pointed out there is reference in the text message data to a shed or what was to be in it. While the [complainant's first name] is in the first text message her surname does not appear.

(c) The seriousness of the offence with which the defendant is charged

[45] Both the Crown and defence agree that aggravated robbery is a serious offence.

(d) Whether there were any other investigatory techniques available?

[46] The Crown concedes that the police should have applied for a search warrant but the failure to do so was under the mistaken belief that s 88 of the SSA applied.

[47] The defence contend that there were not reasonable grounds to believe that there was evidential material on Mr [Siulai]'s cellphone. On page 26 of Mr [Siulai]'s electronically recorded interview he was asked this question.

> Q. So how did your mate know where [the complainant] was?
>
> A. Oh they always oh they must have been texting or something I don't know.

The next answer from Mr [Siulai] was the one already referred to where he said he was sent the address and then he said he got told the address.

[48] The production order itself sought:

- subscriber details, cellular phone number, text data including text content, call data, cellular based station details relating to the sim card [details deleted] between and including the dates of [dates deleted]

- subscriber details, cellular phone number, text data including text content, call data, cellular based station details relating to the sim card [details deleted] between and including the dates of [dates deleted]

[49] Text messaging is a common way of communicating on a cellphone. Mr [Siulai] mentioned that his mate and [the complainant] could have been texting. I am of the view that there were reasonable grounds to believe the phone and its contents may constitute evidential material. So it was not just text communications that was sought by the police but also call data.

(e) Alternative remedies to the exclusion of the evidence

[50] Not applicable

(f) Whether the impropriety was necessary to avoid apprehended physical danger to the police officers

[51] Not applicable

(g) Whether there was any urgency in obtaining the improperly obtained evidence

[52] Clearly there was none and had the officer been aware of the law around search and seizure, a search warrant could have been obtained.

[53] In summary, the intrusion into the right to be free from unreasonable search and seizure was serious and the nature of the impropriety was moderately serious. The nature and quality of the improperly obtained evidence is not crucial to the Crown case. It is not given that a jury will interpret the evidence in the way the Crown contends for. There is other evidence from which the jury will be able to decide whether Mr [Siulai] did rob [the complainant] or have the intention to do so. These three factors together lead me to the conclusion that the evidence must be excluded. To do otherwise would be disproportionate to the impropriety.

Result

[54] The cellphone message evidence as set out at para [8] herein is inadmissible and is not to be led at trial.

Dated at Auckland this 2nd day of March 2018 at am/pm.

P A Cunningham
District Court Judgee