

IN THE DISTRICT COURT
HELD AT PALMERSTON NORTH

T.44/94

IN THE MATTER of an application pursuant to
Section 5(1) of Costs in
Criminal Cases Act 1967

BETWEEN: CRAIG GEORGE WITHEY

APPLICANT

AND: THE QUEEN

RESPONDENT

Date of Hearing: 27 March 1996

Date of Decision: 10 April 1996

Counsel:

- D. ~~Stevens~~ Stephens for Applicant
G. Searancke for Respondent

RESERVED DECISION OF JUDGE A. P. CHRISTIANSEN

At 1.05 p.m. on Saturday 11 December 1993 Malcolm Allan McKenzie was an Undercover Policeman involved in a drug operation. That was not his name, but one which he assumed. At 1.05 p.m. he went to an address at Dannevirke. It was the day of Dannevirke's annual lunch time Christmas Parade. At the address he spoke to a Mr Annan. They had a discussion about cannabis oil and he was invited inside. Shortly after they walked into the kitchen. Another person was observed to be standing at the stove holding a small pot without a handle over a glowing element on the stove. The pot was held with a pair of vice-grips. Mr McKenzie could see a black substance in the pot. On the breakfast

counter there was an empty milo box lying on its side and there were numerous holes punched into that box. Within Mr McKenzie could see the bottom half of myadec capsules. Four of these had already been filled with the black substance. Beside the box was a plastic bag containing a large number of clear empty myadec capsules. There was a dish beside this plastic bag with about 10 capsules that had already been filled. Further along the counter there was a syringe with a dark green substance spread along the inside. On the floor by the back door was a large white plastic bucket. Inside was a muslin cloth stained green and partly concealing cannabis.

Apparently Mr McKenzie had been an Undercover Policeman for three or four years. His observation skills were keen as this brief glance of his surroundings demonstrates.

Mr Annan introduced the other man by the name of "Barry". Mr McKenzie shook his hand. Following a further brief conversation Mr McKenzie purchased two cannabis oil capsules and then left the address. In all he was there for no longer than 10 minutes.

Later that afternoon Mr McKenzie travelled to Napier arriving at the home of his operator (supervisor) Detective Price. They sat at a table and as was their practice they discussed the day's events and Mr McKenzie set about preparing a hand-written summary. (statement). Mr McKenzie's statement covered eight pages. According to Detective Price he read some pages as the statement progressively was being written. Detective Price took issue with Mr McKenzie regarding the adequacy of the latter's description of the manufacturing process that he had observed at Mr Annan's household. Detective Price said there was insufficient detail. He required that part to be rewritten and the further detail to be provided. I infer from Mr Price's evidence that he was rather testy at Mr McKenzie because the detail which had been written was initially inadequate. According to Detective Price those pages (pages 5 and 6) and the succeeding pages were rewritten. The original pages 5 and 6 etc. were then burnt. When the statement was completed each page was signed at the bottom by Mr McKenzie. Mr Price then initialled each page and at the conclusion on page 8 he signed it and noted the time at 1755. On the last page Mr McKenzie had written:

"I best describe Barry as:

male Caucasian, 26-29 years

6'0", medium build, short tight curly blonde/fair hair, unshaven

Tattoo on right forearm of Maori design in green ink."

Mr McKenzie had not seen "Barry" prior to this date nor again before 16 February 1994 when he was asked to identify "Barry" from a montage of eight photographs. From these the photograph of Craig George Withey was identified as "Barry". Later Police evidence reveals the photograph of Mr Withey was different from the others in that it was of poor quality and from a different source - seemingly to have been printed from a video printer. At the preliminary hearing Detective Thurston (who was the officer in charge of the Police "Withey" file) could make out "very few facial features" when he viewed the photograph.

On 21 February 1994 a Detective Baird visited Mr Withey's address. Detective Baird said he was pursuing enquiries on unrelated matters. He had also been requested by Detective Price to make observations of Mr Withey's tattoos. In his report Detective Baird said Mr Withey was at the time wearing a red T-shirt. Mr Withey's tattoos were only just visible beneath the short sleeved T-shirt. Mr Withey agreed to take his T-shirt off. Detective Baird described the tattoos as being animal bulldog designs: "on the left upper arm there was a mosaic of bulldog heads which blended with each other in green ink. The tattoo had a set border at about the middle of his left bicep travelling up to the shoulder. A further bulldog type tattoo was on the back of his left shoulder."

On 10 March 1994 the undercover operation was terminated. On that date both Mr Annan and Mr Withey separately were arrested. Detective Baird dealt with Mr Annan and interviewed him in relation to the charges that he was alleged to have committed. In the course of the interview Mr Annan informed Detective Baird that the person who had been present with him during the purchase of the cannabis oil by an Undercover Police Officer was a Mr Boulton and not Mr Withey. Mr Annan admitted his part in various offences, only one of which allegedly related to Mr Withey.

Detective Thurston was involved in the apprehension and charging of Mr Withey. He was appointed Officer-in-Charge of Mr Withey's case. At Detective Thurston's request Mr Withey accompanied him to the Dannevirke Police Station arriving there at about 9.25 a.m. Before a video interview commenced and after he had been cautioned and given his Bill of Rights, Mr Withey was shown a photograph of the undercover agent and the agent's motor vehicle. Mr Withey stated he had never seen the person before nor seen the car. Asked if he recalled capping oil at Mr Annan's address he stated he did not. He said later that he would have remembered the event. At 10.40 he was interviewed on video and following that was arrested and advised he was to be charged jointly with Mr Annan with manufacturing cannabis preparation.

Meanwhile Detective Baird acting upon information that it was Mr Boulton and not Mr Withey who had been seen by Mr McKenzie made arrangements to interview Mr Boulton. Their interview began at the Dannevirke Police Station at 12.54 p.m. on 10 March 1994. Mr Boulton said he first met Mr Annan about a year previously. The only other dealings he had with Mr Annan was in buying a Pit Bull pup from him in late December early January that year. He denied any drug dealings with Mr Annan or of any association with the occasion of Mr McKenzie's visit to Mr Annan's home. Mr Boulton was described as having three tattoos on his body, a spider and web on his left wrist, a dragon with Conan next to it on his left shoulder and "the zigzag man" on his left collar bone. He agreed to have his tattoos photographed.

Subsequently on 7 April 1994 Mr Boulton voluntarily went into the Dannevirke Police Station to discuss his involvement with Mr Annan. A written statement was taken. In it Mr Boulton acknowledged being at Mr Annan's home on the day of the Christmas Parade in Dannevirke and described moving a bowl of cannabis oil from the stove and being present when the sale of cannabis caps took place. He was shown a photograph of Mr McKenzie and he identified him as the person who bought the caps. He remembered shaking Mr McKenzie's hand. He recalled the sale of two caps of oil but did not know how much was paid for them. He remembered seeing empty caps on the bench.

Please Note.
Page 4. of decision. — WITHEY v POLICE

Following his arrest on 10 March 1994 Mr Withey was remanded in custody until 16 March 1994. On that date he was remanded on bail, a condition of which was that he report to the Dannevirke Police Station between 4.00 p.m. and 5.00 p.m. on each day, Monday through Friday inclusive. Mr Coles, Solicitor of Palmerston North, was instructed on 31 March 1994 and first appeared for Mr Withey in the Dannevirke District Court on 12 April 1994 on which date Mr Withey was remanded to 18 May 1994 for depositions. Mr Coles made a formal request for disclosure of the Police file and between 27 April and 11 May a copy of the Police file was received at his office from Detective Thurston. Among the documents was a typed copy of the statement that Mr McKenzie had made on 11 December 1993. In typewritten form this statement covered six pages. At the conclusion of the statement "Barry" is described as:

"male Caucasian, 26-29 years

6'0", medium build, short tight curly blonde/fair hair, unshaven

Tattoo on left upper arm of design in green ink.

This protruded below his shirt which had the sleeves rolled up and encircled his arm."

Mr Coles was separately instructed to act for Mr Annan and on his behalf a formal request was made to the Dannevirke Police for a copy of his Police file. The disclosure request was complied with on 18 April 1994, being the date on which the file was forwarded to him under cover of a letter from Detective Baird. Included in the documents was a typewritten copy of Mr McKenzie's original statement.

In his affidavit Mr Coles says that on 18 May 1994 he appeared for Mr Withey at a depositions hearing in Dannevirke in respect of his joint charge of producing cannabis preparation. Mr Coles said it became apparent in cross-examination that proper disclosure had not been made by the Police and the depositions hearing on 18 May 1994 was abandoned. I infer from this that Mr Coles became aware of the difference in the last page of the typewritten copy of Mr McKenzie's statement received with the Annan file from the Police, when compared to that received from Mr Withey's file from the Police. In the copy supplied with Mr Annan's file "Barry" is described as:

“male Caucasian, 26-29 years
6’0”, medium build, short tight curly blonde/fair hair, unshaven
Tattoo on right forearm of Maori design in green ink.”

Immediately following the abandonment of the depositions hearing Mr Coles was given a photocopy of Mr McKenzie’s handwritten evidential statement. On the eighth and last page of that “Barry” is described as:

“male Caucasian, 26-29 years
6’0”, medium build, short tight curly
blonde/fair hair, unshaven. Tattoo
on left upper arm of design in green ink
This protruded below his shirt which had the sleeves rolled up and encircled his
arm.”

Mr Coles’ curiosity was aroused. He had some difficulty in understanding how there could be two different descriptions of “Barry’s” identity in the two documents each purporting to be a typed transcript of the same hand-written statement. The differences were obviously nothing to do with typographical error. He became anxious to obtain a copy of the original hand-written statement. Eventually an order was made in the High Court on 29 March 1995 requiring the delivery of the original hand-written copy to the Registrar at Palmerston North.

Meanwhile, a second depositions hearing took place at Dannevirke on 29 June 1994 and on that date Mr Withey was committed to the High Court for trial. Thereafter notice of alibi was given on behalf of Mr Withey to the Police. In effect the notice said the accused could not have been at the place it was said cannabis oil was being manufactured on 11 December 1993. The names and addresses of seven alibi witnesses was provided. Five of these were interviewed by the Police on 28 February 1995. The delay from July 1994 to 28 February 1995 was not hitherto explained until receipt of an affidavit from Detective Thurston dated 26 March 1996 the day before this application was heard. He said he had received a letter from the Crown Solicitor on approximately 11 July 1994 enclosing a copy of the alibi

notice. He was requested to arrange for interviews of the alibi witnesses and to advise the Crown Solicitor of that so that defence counsel could be present if he wished. By November 1994 he had not been able to interview the witnesses due to his high workload. Detective Thurston took leave for six weeks to the beginning of February and accordingly it was not until the end of February 1995 he could undertake the interviews of alibi witnesses. He then reported to the Crown Solicitor on 3 March and on 13 March was advised by the Crown Solicitor's office that a s.347 application would be filed seeking to have Mr Withey discharged. That application was filed on 14 March. Copies of the statements obtained from the alibi witnesses were annexed to that application. In effect each confirmed the 11th of December as a significant date because of its association with Dannevirke's Christmas Parade. Plainly Mr Withey was eating lunch with his parents and others at exactly that time Mr McKenzie reported seeing him at the residence of Mr Annan.

On 30 March 1995 Mr Withey was discharged of all charges pursuant to s.347 Crimes Act 1961. Three days earlier Mr Coles filed this application for costs. On 10 April 1995 he obtained an order releasing the original of Mr McKenzie's statement for forensic examination by Mr J. A. West an acknowledged Document Examiner and Handwriting Analyst.

In an affidavit dated 27 June 1995 Mr West described his examination of the copy of a transcript of the statement by Mr McKenzie supplied with the Police Withey file, a copy of the transcript of Mr McKenzie's statement supplied with the Police Annan file, and the original hand-written statement by Mr McKenzie. He found that the two typed transcripts were probably printed from the same computer disk but there were differences in layout and in their description of "Barry" in the final paragraphs. He directed his examination of the hand-written statement to the paper, the handwriting and signatures, indented impressions on the paper surfaces and the ink. He concluded:

1. The handwriting of the text on all eight pages was consistent throughout as were the signatures of Detective Price and Mr McKenzie. It was his opinion that the persons who signed the first seven pages also signed page 8.

2. The paper of the eighth page was of similar type to the first seven pages but a number of differences were found. The head space and red ruled margin on page 8 was of different measurement. The punch holes on the left side of page 8 were not in register with the punch holes on the other pages. Page 8 was from a different batch to the other seven pages in the statement.
3. The inks of the text and the signatures were examined using selective wave length techniques, microscopic examination and dichroic filtering. Mr West found clear differences between the ink used on the text on page 8 and the ink used on the other seven pages. The track of the pen was also different. Mr McKenzie's signature on page 8 matched the ink of the text on that page but was different to the signatures on the other seven pages. The ink of Mr Price's signature on page 8 was of similar type to the other seven pages but the ink deposit was lighter, consistent with a different pen being used.
4. The surfaces of all eight pages of the hand-written statement were examined using special lighting equipment. Page 8 was also examined using electrostatic detection equipment. Mr West found clear impressions of the signatures of Mr McKenzie and Detective Price on pages 2 to 7 in a position indicating that the first seven pages had been signed while the pages were laid in sequence, each page resting on the page underneath. There were no impressions of the signatures of Mr McKenzie or Detective Price on page 8. The only impressions on page 8 were captured on film (impressions later being identified as the signature of the Crown Solicitor at Palmerston North with the date 30 March beneath).

In April 1995 Mr Withey filed proceedings in the High Court at Palmerston North seeking damages exceeding \$850,000.00 for malicious prosecution. It was alleged there was never reasonable and probable cause for the prosecution of Mr Withey and that the continuation of the prosecution was deceitful, wrongful, improper and with ulterior motive. It claims the actions of the New Zealand Police Officers were high handed, outrageous, contumelious and a wonton and abuse of power. The claim included legal fees of \$21,755.34 incurred in relation to the District Court Criminal Trial.

The within application is for those same legal costs which are the subject of the High Court Civil proceedings claim. The Crown urged me that the present application is inappropriate because the concurrent proceedings in the High Court will enable all issues of alleged bad faith to be fully traversed there. Accordingly, the Crown submitted this Court should limit its consideration in the present application to matters which can properly be dealt with on affidavit evidence. Those issues included the question of delay in interviewing the alibi witnesses and the matter of the earlier interview of Mr Boulton by Detective Baird. The Crown says the issue of malicious prosecution and bad faith should be left for determination in the High Court proceedings.

The present application is made to the District Court in its criminal jurisdiction. I consider in this instance the District Court should complete all matters within its jurisdiction and should do so without regard to the civil proceedings filed in the High Court. I do so acknowledging that findings of fact will in all probability be required of me and that I could make those findings notwithstanding the proceedings in another jurisdiction. In my view those findings of fact could not influence the outcome of the proceedings in the civil jurisdiction of the High Court - that if I should allow the present application the fact of an award of costs might be admissible as evidence in the High Court but it would be no more than evidence of the making of such an award.

The applicant's application was supported by three affidavits namely of Mr Withey and of the previously mentioned Mr Coles and Mr West. The Crown did not seek to cross-examine on any of those affidavits. On the morning of the hearing the Crown filed affidavits by Detective Thurston and Detective Baird. They also called viva voce evidence from Detective Price. The affidavit of Detective Thurston has already been referred to. It explained the reason for the delay in interviewing the alibi witnesses. Detective Baird read his affidavit and was thereafter cross-examined. The job sheets of his interviews of Mr Boulton dated 10 March 1994 and 7 April 1994 were exhibited. In cross-examination he acknowledged he had not referred to any other record, nor indeed any notebook before swearing his affidavit dated 26 March 1996. It was Detective Baird's evidence that he did

not believe Mr Boulton's claim to have been the other person at Mr Annan's residence on the 11th of April when Mr McKenzie called. His reasoning was:

1. In the second interview Mr Boulton could identify the day he was with Mr Annan as the day of the Christmas Parade. According to Mr Baird in the first interview Mr Boulton could not recall that date.
2. Mr Boulton's information about the events of Mr Annan's house that day were different to Mr McKenzie's version.
3. Mr Boulton could not recall the presence of a motor vehicle at Mr Annan's address, the details of which had been noted by Mr McKenzie.
4. Mr Boulton's evidence about how he held the bowl on the stove was at variance to the description given by Mr McKenzie.
5. Mr McKenzie said that while the person was filling the caps with oil there was the presence of a syringe on the bench nearby. Mr Boulton could not recall the presence of the syringe.

It was Mr Baird's conclusion that Mr Boulton "had been fed information about the event".

Mr Baird's conclusion was tested in cross-examination. He acknowledged there were consistencies between Mr Boulton's second interview and the statement of Mr McKenzie. They were that Mr Boulton was there when the Undercover Officer arrived; there was a bowl or pot on the stove; the bowl or pot was taken off the element; and that the two men shook hands; and a sale of two cannabis caps took place.

Detective Price gave evidence of the events concerning the writing of Mr McKenzie's statement on 11 December 1993.

Detective Price recalled Mr McKenzie arriving at his home at about 5.00 p.m. on 11 December 1993. Such visits regularly occurred in the course of an undercover operation. Usually Detective Price would take possession of any exhibits, there would be a brief discussion and Mr McKenzie would write a statement of the events of that day. He recalls them being around the same table. He had been dealing with other correspondence prior to Mr McKenzie's arrival. He recalls reading through pages of Mr McKenzie's statement before it had been completed. Part way through he was concerned that Mr McKenzie had not given sufficient detail of the manufacturing process. He required him to rewrite that part. He said Mr McKenzie was aware of his concern and annoyance about the lack of detail. He said Mr McKenzie rewrote those pages and the originals were then burned. Thereafter Mr McKenzie completed the statement with his description of "Barry". In evidence-in-chief Detective Price said that he signed each page as he read it and he endorsed the last page. It was then, he said, that he queried the description of "Barry". In cross-examination he explained he queried it because "Barry" was described as a Caucasian bearing a Maori tattoo. Thereupon, according to Detective Price, and as if to prove the accuracy of his recollections, Mr McKenzie stood up and positioned himself as if he was "Barry" standing at the stove at Mr Annan's residence. It was then he realised he described the tattoos being on the wrong arm because, according to Detective Price, he realised he could not have seen "Barry's" right arm. Accordingly, he must have seen the left arm. Mr McKenzie then sat down and rewrote the last page of his written statement. Detective Price informed Mr McKenzie that unless he was sure that it was a Maori tattoo he should not say so. Within about 15 minutes of completing the last page on the first occasion, Mr McKenzie had rewritten it and Detective Price had witnessed it. In doing so, Detective Price recorded 1755 the same time at which he had earlier endorsed and witnessed the earlier last page.

Both last pages were then attached to the rest of the statement and sent with other files to a central file held at the Police Station. From that point on he said a Typist would have collected the hand-written statement in order to produce a typed transcript.

Later, after the occasion Mr McKenzie identified Mr Withey from the photo montage, Detective Price had cause to revisit the file. He said he noted both last pages were still

attached to the hand-written statement. Further, the typed transcript had copied the first of these and not the second as should have been done. He said he requested the last page to be retyped. He then destroyed by shredding the incorrect last hand-written page. When asked how a typed copy of that incorrect page survived he explained that Detective Thurston must have already have taken a copy of it for his own file. It will be recalled that Constable Thurston was in charge of the Withey file. An immediate source of curiosity to this Court about this explanation relates to the fact that the Withey file, which was copied to Mr Coles at his request, contained a copy of the transcript, the last page of which referred to Mr McKenzie's second description of "Barry" and not the first.

Detective Price explained that the fact that Mr West had determined the surviving last page of the hand-written statement to be in a different paper and signed with a different pen would be due to the fact that more than one writing pad and more than one pen would have been resting on his table when the document was written. Therefore Mr McKenzie must have used a different pad and he and Detective Price must have chosen different pens when writing and signing that last page for a second time.

Mr Stevens cross-examination of this explanation clearly indicated cynicism and disbelief. Detective Price confirmed Mr McKenzie would have been fully trained as an Undercover Police Officer. This would have included training in the skills of acquiring detailed observations. Mr Stevens recalled that the Document Examiner's report indicated the first seven pages of the statement must have been resting one atop the other - accordingly, Detective Price could not have initialled them as they were written but only after the statement was completed. Detective Price conceded that must have been so. Why then was the first (and incorrect) last page not burnt along with those others which had been burnt when Detective Price required them to be rewritten when the manufacturing process had not been described in sufficient detail. Detective Price's response was to the effect that it should have been, it was an oversight. Why then did Detective Price witness and insert the time of 1755 on the first and incorrect last page before challenging Mr McKenzie's description of "Barry"? Why did Mr McKenzie re-enact "Barry's" stance by the stove in response to Detective Price's query regarding "Barry's" description? What caused Mr McKenzie to believe he had mistaken the left arm for the right when he did at that time also

shake "Barry's" hand? Why, when the rewritten last page was completed 15 minutes after the first, did Detective Price note the same time of 1755 upon it? Why in the rewritten last page did a tattoo on the right forearm become a tattoo upon the left upper arm? Why in the rewritten last page was there added to the description of the tattoo the fact that it "protruded below his shirt which had the sleeves rolled up and encircled his arm"? Detective Price said it was not uncommon for pages to be rewritten. His job as operator included ensuring an adequate description was available for evidential purposes. It was not a "biggy" he said. According to him mistakes sometimes happened which needed rectification. Mr McKenzie chose to do the re-enactment because their discussion was heated and he wished to prove a point regarding his first description of "Barry". In the course of that re-enactment he, Mr McKenzie, realised his first description was wrong. Detective Price was happy that Mr McKenzie's mistakes were genuine. He did not consider it necessary for a second statement to be written acknowledging and correcting the mistake in the first.

Asked why he requested Detective Baird on 21 February 1994 to check details of Mr Withey's tattoos, he said he was aware Mr Baird was making other unrelated enquiries with Mr Withey and that it would be an opportunity for him to confirm the description they had of Mr Withey's tattoos (i.e. that contained in the rewritten last page).

Detective Price had prepared the photograph montage for viewing by Mr McKenzie. Detective Price acknowledged that the photograph was a different type to the others contained in the montage and that the person in the photograph was wearing a moustache. Although Mr Withey is only 5'6½" tall that statistic was not detailed in any record before the present proceedings were filed. That statistic was not apparent from Mr Withey's photograph which comprised part of the montage Detective Price prepared. The description however must have been apparent to Detective Baird and Detective Thurston who interviewed Mr Withey on the 21st of February 1994 and 10th of March 1994 respectively.

Detective Price acknowledged the photograph was not of good quality, but he said it clearly showed Mr Withey. Detective Price said that if he felt there was any doubt about Mr Withey's identity then he would not have gone ahead with the prosecution. He said he only ever discussed with one Officer, a Detective Ennor, the fact that he had the last page of the

transcript retyped. Detective Ennor has since died. He acknowledged there was no written record to support his evidence of the circumstances of the changes that had occurred to the last page.

In support of his case the applicant submitted:

1. The prosecution did not act in good faith in bringing and continuing the proceedings;
2. There was not, at the commencement of the proceedings, sufficient evidence in the hands of the prosecution to support the conviction of the applicant in the absence of contrary evidence;
3. The prosecution did not take proper steps to investigate any matter coming into its hands which suggested that the applicant might not be guilty;
4. Generally the investigation into the offence was not conducted in a reasonable and proper manner.

The Crown submitted:

1. The prosecution acted in good faith in bringing and continuing the proceedings. The Crown accepted that the final page of the statement was altered and rewritten. In the ordinary course of Policing business this was not unusual and nothing should turn upon it.
2. The evidence of Mr West was not refuted but the inference to be drawn from that evidence clearly was.
3. Mr Baird interviewed the alibi witness Boulton on two occasions and concluded, reasonably, that Mr Boulton was lying.

4. Given the perception of unreliability of Mr Boulton and given the positive identification made by Mr McKenzie the prosecution did have sufficient evidence at the time the proceedings were commenced against Mr Withey.
5. After commencement of the proceedings further enquiries of Mr Boulton did not give the Police reason to believe Mr Withey was not guilty.
6. The reasons for the delay in interviewing other alibi witnesses was adequately explained by Detective Thurston.
7. Overall, taking into account the evidence of Detective Price and Detective Baird the Police investigation into the offence was conducted in a reasonable and proper manner.

It is my view of the evidence that the actions of the Police and Police Officers throughout amount to bad faith. In expressing that view I do not consider it necessary to make a finding about whether those actions were motivated by malice. That will be a question for determination in other Court proceedings and where different considerations may apply.

Detective Price's explanation for the changes which occurred in the original hand-written transcript stretches the bounds of credibility. In a brief visit to Mr Annan's residence Mr McKenzie was able to describe in detail the events including the conversation which occurred in the kitchen. However, only later at Detective Price's house and after carrying out a re-enactment of his meeting with Mr Annan's guest, Mr McKenzie, I am encouraged to believe, then became aware that the tattoo on Mr Withey's right forearm was now recognised to be a tattoo upon his left upper arm. Furthermore, it was no longer of Maori design. Further, as a result of the re-enactment the tattoo was, for the first time, able to be described as "protrud(ing) below his shirt which had the sleeves rolled up and encircled his arm". Detective Price recalled Mr McKenzie's explanation for confusing the right arm with the left. He said he could not see the right arm and therefore it must have been the left arm. This explanation overlooks the fact that Mr McKenzie shook hands with "Barry".

If Detective Price was satisfied regarding this explanation from Mr McKenzie why was it necessary for him to request Detective Baird on 21 February 1994 to check details of Mr Withey's tattoos. Particularly when, to that date, Mr Annan had not been spoken to nor had he identified Mr Boulton as the person who was with him on the occasion of Mr McKenzie's visit. Detective Baird's visit occurred just some days after Mr McKenzie made a photograph identification from the montage prepared by Detective Price. It was at a time after the photographic identification that Detective Price had cause to examine the Withey file and discovered both versions of the hand-written last page were still upon it. The chronology of these events gives considerable cause for scepticism regarding the explanation that Detective Baird's visit to Mr Withey on 21 February 1994 was nothing other than in the ordinary course of investigations.

Detective Price is a Police Officer with some 20 years experience of which some 16-17 years he has been a Detective. Mr McKenzie was a trained Undercover Operator. As such he would have skills in detailed observation and description. Accordingly, it should have occurred to Detective Price that the two different descriptions of "Barry" would be a matter of considerable significance. If that fact was known to Detective Price then his destruction of the first hand-written last page was a wilful act to suppress evidence. If Detective Price was not aware of the significance of the fact of the differing descriptions of "Barry" then his actions in destroying that page amounted to inexcusable negligence.

When Mr Annan was interviewed on 10 March 1994, following which he was arrested, he made a frank admission of his offences. He subsequently pleaded guilty and was sentenced in relation to them. On the occasion of that interview Mr Annan had identified Mr Boulton as the person in the kitchen on the 11th of December 1993. He denied it was Mr Withey. It will be recalled that Detective Baird interviewed Mr Boulton within a few hours after Mr Annan had provided this information. Mr Boulton denied involvement. His denial could not have been unexpected. When however he was interviewed for a second time on 7 April 1994 Mr Boulton admitted his involvement and provided details of the events including shaking Mr McKenzie's hand. Detective Baird did not believe Boulton's "confession" because he said there were significant differences in the detail provided by Mr Boulton to that provided by Mr McKenzie. Of that explanation I observe that those matters of

difference were of detail only and it ignores the fact there were also significant matters of detail upon which both Mr Boulton and Mr McKenzie agreed.

Prior to 11 July 1994 Mr Withey's counsel, Mr Coles, served notice of alibi upon the Crown Solicitor. Eventually the charge against Mr Withey was scheduled for trial on 30 March 1995. However, it was not until 28 February 1995 (more than seven months after the notice of alibi had been delivered) that the Police undertook the interview of Mr Withey's alibi witnesses. The detail contained in the notes of interview of those witnesses was such that the Crown Solicitor realised the charge should not proceed. The Crown Solicitor's assessment was correct. The alibi evidence was compelling. Upon any assessment of the matter it was clear Mr Withey would be acquitted if the matter proceeded to trial.

The Crown Solicitor's application to discharge Mr Withey was filed on 14 March 1995. On that date the defence was prepared for trial, new defence counsel had to be engaged because Mr Coles would be required to give evidence for the defence. The evidence of the alibi witnesses had been briefed by the defence. Without doubt the Crown Solicitor's application would have been filed a lot sooner if the alibi witnesses had been interviewed much earlier than they were. The explanation by the Police for their delay in interviewing the alibi witnesses falls far short of being satisfactory.

Accordingly I find:

1. The prosecution did not act in good faith in bringing and continuing the proceedings.
2. At the commencement of the proceedings the prosecution was without sufficient evidence to support a conviction of Mr Withey.
3. The prosecution failed to take proper steps to investigate information tending to cast doubt upon Mr Withey's guilt.

4. Throughout the investigation of Mr Withey's alleged involvement was not conducted in a reasonable and proper manner.

The applicant is entitled to an award of costs.

The applicant seeks an order for costs in excess of the scale. The scale may be exceeded on grounds of special difficulty, complexity, or importance of the case (s. 13 (3)). To justify costs in excess of the scale the case must not merely be of importance to the accused but must be one that is "not in the ordinary run of cases"; **R v Accused** (T.30/91)(1991) 7 CRNZ 686. **Reriti v Police** (18/4/94, Erber DCJ, DC Christchurch, CRN: 3009023671). That case is authority of an instance where bad faith or negligence on the part of the prosecution will amount to "special difficulty" falling within the ambit of s. 13 (3).

Where the case is one of special difficulty the criterion for an award of costs rests solely upon the Court's consideration of what in the circumstances may be just and reasonable: **Reriti** (Supra). In **T v Collector of Customs** (17/10/94, Tipping J, HC Christchurch, AP.167/94) His Honour observed that:

"[If] under s.5(2)(a) the Court is of the view that the prosecution had not acted in good faith that might be a strong pointer to awarding costs towards an indemnity level."

While **R v Margaritis** (14/7/89, Hardie-Boys J, HC Christchurch, T.66/88) is authority to the effect that the existence of the scale "makes it clear that there is no intention that a successful applicant should receive a full indemnity". Erber DCJ in **Reriti** expressed this view:

(While what was said in **Margaritis**) "must be true in most cases especially where the defendant/accused has a case to answer as was the case in **Margaritis**, or even where there is no case to answer but where it might reasonably be said that the defendant/accused brought the prosecution on his own head. However,

where the defendant/accused should never have been charged because he was innocent of wrong doing and the prosecution knew or ought to have known that, in my judgment it cannot be said that he should bear any of the costs of demonstrating that innocence to a Court. This would be the case where the innocent person is prosecuted in bad faith or as a result of inexcusable negligence on the part of the prosecution. It is quite clear that the breadth of the power of the Court to award costs under s.5(1) is not trammelled by the specific criteria set out in s.5(2)."

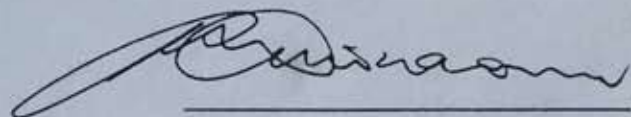
Mr Withey was prosecuted in bad faith. Even if I am to accept Detective Price's explanation regarding the rewritten last page of Mr McKenzie's statement the actions of the Police amount in my view to inexcusable negligence.

Having given consideration to the factors specifically set out in S.5(2) this Court can now use its discretion "... to do what it thinks right in the particular case": Margaritis (Supra).

In my view, but for an element of luck and because of his counsel's vigilance Mr Withey might well have faced trial and the risk of a wrongful conviction. Because his counsel also acted for Mr Annan the discovery of the two last pages of Mr McKenzie's statement became possible. Hitherto the Police case was supported by a description of "Barry" which linked Mr Withey to the crime he was charged with. Credibility of this description was strengthened by Mr McKenzie's identification of Mr Withey from a photograph montage. That evidence if accepted by a Jury would be powerful and compelling. Only after belatedly undertaking an interview of the defendant's alibi witnesses did the prosecution resile from their position. The question of whether the Police manipulated or manufactured the evidence against Mr Withey is one which will be left to another Court on another day. In coming to the conclusion I have it has not been necessary for me to express a view on those matters. I resist the temptation to do so. It would be imprudent to do so in view of the pending civil proceedings. Further, it would not have affected my decision regarding the amount of damages to be awarded.

Mr Withey's affidavit in support of this application details his actual legal fees and those in respect of which he has incurred liability. This Court has also received copies of some invoices for legal fees. The fees of senior counsel has been charged at between \$75.00 and \$160.00 per hour. Overall it is my view the charges are moderate. Some duplication of fees has occurred due to the fact that alternate counsel needed to be briefed when it became apparent Mr Coles would have to give evidence for the defence. Those additional costs were in the circumstances justified. Mr Withey's costs exclusive of those incurred in relation to this application amount to \$18,433.42. In my judgment these must be paid in full. I make that order accordingly. In addition, the applicant will be allowed \$1,500.00 costs upon this application. Pursuant to s.7(2) of the Costs in Criminal Cases Act those costs shall be paid by the Police Department.

Following the hearing of this application on 27 March 1996 I made an order pursuant to s.138 of the Criminal Justice Act 1985 prohibiting publication of the details of the hearing or of the witnesses concerned, until the date of this decision. That order shall continue to remain in force for a period of seven days from the date of this decision but thereafter it will not be renewed by me.



(A. P. Christiansen)

District Court Judge