

**REPORT OF THE POLICE COMPLAINTS AUTHORITY
ON CERTAIN ISSUES ARISING OUT OF A POLICE
UNDERCOVER OPERATION CONDUCTED
IN 1993 AND 1994**

INTRODUCTION

At a depositions hearing on 29 June 1994 in the Palmerston North District Court, Mr Craig Withey was committed for trial on a charge of manufacturing cannabis oil. This followed a large scale Police operation, '*Operation Brother*', in the Hawkes Bay between July 1993 and March 1994 which employed a special duties, or undercover, Police officer, Constable Malcolm McKenzie, who was mentored by a detective, Detective Keith Price. The target of the operation was suspected drug-dealing in the area.

In the prosecution evidence a significant element was a statement made on 11 December 1993 by Constable McKenzie which identified Mr Withey as having been present earlier that day at premises in Dannevirke, occupied by Mr Michael Annan, at which cannabis derivatives were in process of production. The statement contained a physical description of a person who was present but who was known to the officer only as *Barry*. Mr Withey fitted the description of *Barry*, a feature of which description was the presence of a tattooed design on *Barry's* left upper arm.

The precise position of this tattoo on Mr Withey's person, whether it was the left or the right upper arm, and its design, became of particular significance after the prosecution of Mr Withey failed, for reasons referred to below. The Authority's independent review of these matters and their investigation has focussed chiefly on the integrity of the statement by Constable McKenzie containing this description and the different version of that statement which later emerged.

The circumstances surrounding the description of the position of the tattoo became the basis of a subsequent Police internal investigation, an investigation which has been independently reviewed by the Authority under the terms of the Memorandum of Understanding between the Authority and the Commissioner of Police.

In this regard it may be noted that the Memorandum of Understanding came into force in 1994. It provides for allegations of serious misconduct or neglect of duty on the part of Police officers which are internally reported to be notified to the Authority. The Authority addresses such notifications in the same way as are complaints which have been lodged with the Authority by members of the public.

THE STATEMENTS

Constable McKenzie's statement described his association in December 1993, when operating as a special duties officer, with two individuals in a situation in which offences against the Misuse of Drugs Act appeared to have been in progress. One of the individuals, the person introduced to the Constable as *Barry*, was subsequently described by the Constable in a statement concerning the meeting and what passed at it, in the following terms:

'I best describe Barry as: Male caucasian, 26-29 years, 6'0", medium build, short tight curly blond/fair hair, unshaven.

*Tattoo on **left upper arm of design** in green ink' (emphasis added)*

It was alleged by the Police that the person so described was Mr Withey. In March 1994, on the termination of the undercover operation, he was arrested.

At the Palmerston North District Court on 29 March 1995, at the hearing of an application by the Crown that Mr Withey be discharged on a charge of producing cannabis oil, it was disclosed that there were two versions of the statement.

It had happened that the other person present at the encounter, Mr Annan, had already been convicted on charges arising from the encounter with Constable McKenzie. The officer's statement in that case, a statement identical in almost all respects to that produced in the proceedings against Mr Withey, had been introduced at Mr Annan's trial. However, it differed in its description of *Barry*, the person claimed to have been Mr Withey, in the following

important respect:

'I best describe Barry as: Male caucasian, 26-29 years, 6'0", medium build, short tight curly blond/fair hair, unshaven.

*Tattoo on **right forearm of Maori design** in green ink' (emphasis added)*

The two Police officers who produced the statement central to this review, Detective Price and Constable McKenzie, maintained that the difference between the two versions of the statement arose at the initial drafting stage on 11 December 1993. It was said that on reading the statement which Constable McKenzie had made to the Detective it emerged that an error had been made in the statement where it described the position of a tattoo on the right arm of the individual said to be Mr Withey. It was realised by Constable McKenzie that in fact the tattoo was on the suspect's left arm. The two officers later said that the section of the manuscript statement containing that reference was corrected then and there and a fresh last page containing the revised description was produced.

The following morning, on 12 December 1993, the original papers were both referred by Detective Price for typing and for enclosure in the file held at the Police station. In an attempt to identify *Barry*, Detective Price then contacted Dannevirke Police and spoke with a Detective Peter Baird outlining the requirement to have *Barry* identified. Detective Baird was unable to assist but later another officer at Dannevirke opined to Detective Price that *Barry* might be Mr Withey.

Detective Price then made up a montage of photographs including that of Mr Withey and, on 16 February 1994, showed them to Constable McKenzie. The Constable identified Mr Withey's photograph as depicting the person he had referred to as *Barry*, and made a short statement to that effect. Having identified Withey, Detective Price was anxious to confirm the existence of his tattoo and other details relating to his description and address.

On 21 February 1994 Detective Baird had gone to see Mr Withey about an unrelated matter. It is reported that he had been asked by Detective Price to note the position of Mr Withey's tattoo. Detective Baird did so and described in some detail the tattoo on Mr Withey's left upper arm. Detective Price again checked the typed statement by Constable McKenzie in which he had described *Barry's* tattoo which had earlier been filed with papers relating to *Barry*.

On doing so Detective Price discovered that a mistake had occurred in the typing of the original statement of Constable McKenzie in that the relevant page still contained the

uncorrected first description of *Barry's* tattoo. On then checking the hand-written original version of the statement Detective Price discovered that there were two last pages. One page contained a description of the tattoo and placed it on the left upper arm, the other gave a slightly different description and placed the tattoo on the right arm, the former being the 'corrected' page of the statement. Detective Price removed those two last pages and asked a typist to amend the statement to show the correct description of the tattoo. The page was then reprinted. Detective Price stated that he destroyed the incorrect statement and the incorrect hand-written page and filed the amended typed statement.

Detective Price also stated that at this time another detective, Detective Ennor, was preparing the files relating to Mr Annan and Mr Withey for finalisation of action. The statement of Constable McKenzie had obvious significance in the proceedings against both of the alleged offenders and copies of it consequently appeared in the file of papers in each case. Detective Price, having corrected the Withey file as above, accordingly informed Detective Ennor that the wrong document was on the Annan file. He later stated that he assumed that Detective Ennor would make the necessary rectification.

In the event it is evident that this rectification was not made in respect of the copy of the statement by Constable McKenzie that was on the Annan file.

In a reserved decision given on 10 April 1996 on an application by Mr Withey for costs, Judge A P Christiansen said that *'Detective Price's explanation for the changes which occurred in the original hand-written transcript stretches the bounds of credibility'*. The Judge questioned why, if Detective Price was satisfied with the description given by Constable McKenzie of Mr Withey's tattoo, it was necessary for him to ask Detective Baird to check the detail of the tattoo at the unrelated encounter between the latter and Mr Withey on 21 February 1994.

DISCLOSURE

The existence of these two differing statements became apparent to legal counsel, Mr Peter Coles, by virtue of his coincidentally representing each of the defendants in the separate proceedings against them. In the course of this representation he had made a request to the Police for disclosure of the Withey file and on 18 April 1994 he received a transcript of Constable McKenzie's notes which had been made on 11 December 1993. The file contained a typed copy of Mr Withey's original statement, but it differed in the respect noted above from the statement with which Mr Coles had previously been supplied in the earlier

case of Mr Annan in that Mr Withey's tattoo was described as being on his left arm, and not on the right.

COURT ACTION

In the depositions hearing on 29 June 1994 Mr Withey had been committed for trial. In March 1995 an application was made by the Crown that he be discharged. This application was heard by Judge L. E. Laing who noted that:

'..... what has resulted is an application by the Crown for Withey to be discharged on the basis that there are apparent difficulties in the identification of Withey by the only Crown witness who identifies him and who was, at the time of the alleged offence, a special duties constable'.

In his ruling the Judge referred at some length to the transcripts of the statement made by Constable McKenzie on 11 December 1993. He noted the differences that have been referred to above, and said that:

'The first instinctive reaction to viewing the transcripts is that there has been deliberate tampering and accordingly that is advanced on behalf of the applicant because if the prosecution of the applicant and his committal for trial was brought about, not by negligence, but by malicious prosecution or malafides, then that would ordinarily be reflected, either in an award of costs, or in support of the type of civil proceeding that might be open to him'.

Mr Withey was accordingly discharged on the next day, 30 March 1995.

In his decision on the successful application made by Mr Withey for costs Judge Christiansen made comments strongly critical of the Police. The Judge said that:

'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'.

CIVIL PROCEEDINGS

A civil action was then instituted by Mr Withey seeking \$850,000 damages for malicious prosecution. It was alleged that the statement had been dishonestly altered so as to secure

the conviction of Mr Withey and that Mr Withey's arrest and prosecution was undertaken without reasonable and probable cause, and maliciously.

In the prosecution of Mr Annan, the evidence relating to the position of the tattoo on the person alleged to have been Mr Withey was not of significance at the time that case was heard. In the case against Mr Withey himself, however, it clearly became of considerable significance in identifying him as the second person present with Mr Annan when Constable McKenzie called.

It was alleged by Mr Withey that the statement had been amended, not on 11 December 1993 as claimed by the Police, but at a later date in order to strengthen the case against him. Constable McKenzie had not seen Mr Withey again after their initial encounter, but had identified Mr Withey on 16 February 1994, from the photographic montage, as the person he had seen.

THE CIVIL LITIGATION

In May and June 1998 the civil claim brought by Mr Withey was heard in the High Court at Palmerston North, it being described to the jury by the presiding Judge, Justice Ellis, as '*a very difficult case*'. The verdict of the jury in response to several issues which were put to it presented difficulties of interpretation which were the subject of legal argument following the trial. The decision of Justice Ellis, given on 10 August 1998, was that Mr Withey was entitled to judgment. The Crown appealed and, in a judgment given on 20 July 1999, the Court of Appeal decided that, the answers given by the jury appearing to be '*flatly contradictory*', neither party was entitled to judgment. The verdict was accordingly set aside and a new trial ordered.

In the event the new trial did not proceed, the parties reaching a settlement out of Court.

INVOLVEMENT OF THE AUTHORITY

The broad circumstances of the matter had come to the attention of the Authority in August 1996 and 1997. It was not at that stage a matter requiring action on the part of the Authority, in particular as by then the civil proceedings by Mr Withey had been commenced.

Although no complaint had been received (or was subsequently received) from Mr Withey, it was clear that the matters in issue would be addressed in Court and that consideration of those matters by the Authority, based only on the papers then available, would serve no

purpose. In May and June 1988, however, the issues had so developed, particularly in the course of the civil proceedings, as to prompt the Authority to ask the Commissioner of Police for enquiries to be made into the matter. It was asked that those enquiries commence on the completion of the civil proceedings, this course enabling the facts of the matter to be first tested and established, by sworn evidence subject to cross-examination, in Court.

THE ALLEGATION

The allegation which emerged was that Constable McKenzie or Detective Price, or both of them, may have acted so as, in the words of the Court of Appeal, *'to make a false case against a man whom they knew to be innocent'*. It was alleged that they, or one or other of them, had committed perjury and/or attempted to defeat the course of justice.

INVESTIGATION

The Police investigation of this matter addressed the very serious question that had arisen as to the professional integrity of the two Police officers, in respect of whom critical judicial comment had been made. The question was whether the amendment of the statement was a regularisation of a drafting error or, in short, something more sinister.

In reviewing the investigation the Authority has considered a substantial volume of material which has accumulated as the matter has proceeded through the Courts and has been the subject of investigation and consideration by senior members of the Police.

One review of the matter by a senior Police officer concluded that the means adopted to correct an error were *"inadvisable in the extreme"*. It was commented that the correct course would have been to document the matter thoroughly, to report it to superiors, and thus make *"the whole activity particularly transparent"*. The conclusion was however that *"any consideration as to criminal wrongdoing must have supporting evidence and, in this case, that is not present"*.

There was also an opinion provided by senior legal counsel, external to the Police, who advised that in his view it would be wrong to prosecute either officer as *"the reliable evidence required to do so is missing"*. Also in his view there was *"no room to prosecute for any disciplinary offences"*, although he commented that *"there may have been some sloppy practice in the way that the mistakes of 11 December 1993 were handled"*.

A review of the entire matter was undertaken by Detective Superintendent L S Reid who undertook some additional enquiries as well. His conclusion was that the allegations against the two officers must be considered unproven.

Detective Superintendent Reid made this observation of the matter:

“What occurred here is a valuable lesson for the undercover programme in so much as it is very necessary to be absolutely accurate in regard to statements, particularly those statements relating to identification.”

DISCUSSION

It is not possible for the Authority, on the papers, to do more than has been achieved throughout an extended history of investigation, consideration and litigation. The difficulties of the matter are illustrated by the inconclusive ending to the civil proceedings. The matter remains in the realm of allegation and denial and, at most, of unresolved suspicion.

The Police have in my view investigated the matter thoroughly and have considered whether there is any basis for criminal prosecution or for disciplinary proceedings. The voluminous material available in the matter does not show that criminal or disciplinary proceedings could succeed. Proper regard has been paid by the investigating officers to the adverse judicial comments which were made in the criminal proceedings.

It is to be recognised that there may have been gravely improper conduct but equally there may have been no more than a mismanaged correction of a clerical error.

The lesson which emerges from the entire matter is trite but fundamental. It is that there is in all Police work, whether special duties or routine, a need both for manifest integrity, for meticulous attention to detail, and for meticulous attention to correct procedures. A failure in the latter respects may lead to suspicion, well founded or not, that there has been a failure of integrity.

Judge I A Borrin
Police Complaints Authority
5 September 2003