

Summary Report

Allegation of Perjury by Police officer in judicial review proceedings brought by Kim Dotcom

INTRODUCTION

1. On Thursday 9 August 2012 Detective Inspector Grant Wormald gave evidence in the High Court at Auckland during judicial review proceedings commenced by Mr Kim Dotcom. These proceedings related to the execution by Police of a search warrant and arrest warrants at his residential Coatesville property.
2. In the course of cross-examination, Detective Inspector Wormald was asked twice whether he was aware of any surveillance of Mr Dotcom by either the Police Surveillance Team in Auckland or any other government organisation in New Zealand prior to 19 January 2012, and he replied in the negative.
3. Later in the year, the media reported that the Government Communications Security Bureau (GCSB) had intercepted the communications of Mr Dotcom and one of his associates Mr Bram van der Kolk prior to the execution of the warrants, and that this was at odds with the evidence given by Detective Inspector Wormald. In particular, on 25 September 2012 the TV3 Campbell Live programme stated that his evidence had now been shown to be untrue, and on 26 November 2012 the Hon Winston Peters on the TVOne Q&A programme said that he had apparently committed perjury and the Police had covered it up.
4. Paul Davison QC subsequently lodged a complaint with the Commissioner of Police on 24 July 2014 alleging that the Detective Inspector's evidence was, and was known by him to be, false and misleading, and requesting that a criminal investigation into possible perjury be initiated.
5. This complaint was referred to the Authority on 6 August 2014. The Authority reviewed the matter and determined that it should be referred back to the Police for investigation and that the Authority would actively oversee that investigation and review the outcome.

6. On 13 October 2014, the Police reported to Mr Davison that, having conducted an investigation, they had concluded that there was insufficient evidence to meet the threshold for prosecution for perjury. More particularly, they concluded that any inaccuracy in Detective Inspector Wormald's replies during cross-examination were the result of "*a shared mistake or possibly inadvertence as to the nature of the terms under consideration*" and that there had been no intent to mislead the Court.
7. In the light of the publicity surrounding these events and the conclusion reached by the Police investigation, the Authority decided that it should conduct its own independent investigation in order to satisfy itself that there had been no Police impropriety during the proceedings in question. It advised the Commissioner of Police accordingly on 21 October 2014.

BACKGROUND

8. On 21 January 2012 the Police executed a search warrant and a number of arrest warrants at the residential premises of Mr Kim Dotcom in Coatesville, Auckland. Detective Inspector Grant Wormald, who was then a Taskforce Manager at the Organised Financial Crime Agency of New Zealand, was the officer tasked with the planning and organising of the operation and the supervision of the officers involved in it.
9. Prior to the execution of the warrants the Police gave detailed consideration over a period of time to the way in which the warrants, which were directed at both Mr Dotcom and a number of his associates, should be executed. It was determined that the risks involved in the operation were best addressed by executing the warrants at Mr Dotcom's home at a time when he and the other parties sought were likely to be present.
10. In order to determine the appropriate date for such an operation, the Police recognised that they needed some intelligence as to the movements of Mr Dotcom and his associates. A meeting was held on 14 December 2011, at which there was a discussion as to how that information might be obtained. A number of other government agencies, including staff from the GCSB, were present at that meeting. Consideration was given to whether the Police might potentially intercept the private communications of Mr Dotcom or his associates in order to obtain the required intelligence. However, it was determined that the legal grounds for the issue of an interception warrant (as it was then termed) could not be made out. However, the staff from the GCSB who were present said that they were likely to be in a position to assist in intelligence gathering for the Police, and subsequently collected information which they passed on to the Police in advance of the execution of the warrants. The Police were not given information by the GCSB as to the precise manner in which that information had been obtained.
11. Detective Inspector Wormald attended the meeting on 14 December 2011. When he gave evidence, therefore, he had knowledge of the fact that the GCSB offered, and subsequently provided, assistance to the Police that might have involved the interception of the private communications of Mr Dotcom and at least one of his associates.
12. The Police themselves did not intercept any private communications during the planning of the operation. Nor did they undertake any other form of surveillance of Mr Dotcom or his associates until 19 January 2012, when the Police Surveillance Team from Auckland District was deployed to undertake physical surveillance of those who were the subject of the warrants.
13. Following the execution of the warrants, Mr Dotcom initiated judicial review proceedings in relation to the Police raid on his property, which were heard in the High Court in Auckland in August 2012. He was represented by Mr Davison QC. Detective Inspector Wormald gave evidence for the respondents to those proceedings. His evidence was lengthy, lasting for over one and a half days and giving rise to 120 pages of transcript.

14. During cross-examination, he was asked about the meeting that occurred on 14 December 2011. He confirmed that, apart from the Police, there were attendees from the Ministry of Justice and Crown Law Office. He also confirmed that there were staff present from another government agency, the identity of which was withheld (but subsequently disclosed to be the GCSB). He was not asked why they were at the meeting or what role they were going to play.
15. At a subsequent point during cross-examination, having established that the Police had not intercepted the conversations of Mr Dotcom or his associates and were relying upon intelligence provided by the FBI, Mr Davison moved on to ask him about a note made in his notebook during the meeting on 14 December 2011, that read "*brief surveillance today*". Detective Inspector Wormald explained that this referred to the fact that he had recognised that the Police would need to use the Police Surveillance Team (responsible for the physical surveillance of people) before the planned execution of the warrants in January, and that since it was the holiday period he would need to give them warning that they would be needed.
16. There were then two separate sets of questions about the surveillance that had been directed at Mr Dotcom.
17. The first question, and the answer given by Detective Inspector Wormald, was in the following terms:
- Q. *So apart from the surveillance which they might have been going to undertake on your behalf, was there any other surveillance being undertaken here in New Zealand to your knowledge?*
- A. *No there wasn't.*
18. Some two hours after the first question, Mr Davison returned to the role of the Police Surveillance Team, and the following exchange ensued:
- Q. *We've been provided with some – the plaintiffs have been provided with some surveillance notes that related to surveillance being undertaken of Mr Dotcom on the night of the – well on the day of the 19th of January of this year and at paragraph – I can't just put my finger on the paragraph at present but I think you've said in your affidavit that you had Mr Dotcom under surveillance from the 19th?*
- A. *Yes.*
- Q. *So can we take it from that that there was no surveillance whatsoever of him prior to the 19th?*
- A. *Yes, that's correct.*
- Q. *Either by the surveillance team or any other government organisation here in New Zealand?*
- A. *Not that I'm aware of.*

19. It subsequently became public knowledge that the GCSB had in fact intercepted the private communications of Mr Dotcom and his associate Mr Bram van der Kolk. On behalf of Mr Dotcom, Mr Davison has alleged that Detective Inspector Wormald's evidence was accordingly false and misleading, and was known to be so.

THE AUTHORITY'S INVESTIGATION

20. The Authority had conducted an earlier investigation into the Police decision not to prosecute staff of the GCSB for the unlawful interception of the private communications of Mr Dotcom and Mr van der Kolk (see our report entitled *Police investigation of alleged unlawful interceptions of private communications by Government Communications Security Bureau*, published 17 July 2014). As a result of that investigation, we were already familiar with the steps that had been taken by the Police prior to the execution of the warrants on Mr Dotcom's house.
21. In addition, we interviewed Detective Inspector Wormald and reviewed the full transcript of the evidence he gave during evidence in chief and cross-examination. We also considered the Police analysis of the evidence and the reasons for their view that there was insufficient evidence to warrant a prosecution for perjury.
22. The law relating to perjury is set out in section 108(1) of the Crimes Act 1961, and reads as follows:

Perjury is an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his or her evidence on oath, whether the evidence is given in open court or by affidavit or otherwise, that assertion being known to the witness to be false and being intended by him or her to mislead the tribunal holding the proceeding.

23. In our investigation, we have therefore addressed the two key ingredients of the offence:
 - whether there was a false statement that Detective Inspector Wormald knew to be false;
 - if so, whether Detective Inspector Wormald made this false statement with the intention of misleading the Court.

AUTHORITY'S FINDINGS

Issue One: Were either of the answers given by Detective Inspector Wormald (set out in paragraphs 16 and 17 above) known by him to be false?

24. When the Authority interviewed Detective Inspector Wormald, we asked him what he meant by his answer, set out in paragraph 16 above, that apart from the surveillance which the Police Surveillance Team might have been going to undertake, there was no other surveillance being undertaken in New Zealand to his knowledge. He explained that the preceding questions all related to the visual surveillance of Mr Dotcom and his associates in the days leading up to the execution of the warrants. He noted that the question followed other questions about his notebook entry on surveillance (which referred to visual surveillance), and he said that he *“didn't for a minute think that [Mr Davison] was angling towards anything other than the surveillance that we had in terms of the people in cars [and] following [the subjects]”*. He said that there had been earlier questions about interception, and he thought that Mr Davison had concluded that line of questioning sometime earlier and that the cross-examination was now moving on to surveillance. He then said that *“my answer really was about people in cars following Mr Dotcom around. It never occurred to me that it was anything other than that”*.
25. We also asked Detective Inspector Wormald what he meant by his second answer, set out in paragraph 17 above, in which he said that there was no surveillance whatsoever of Mr Dotcom prior to 19 January 2012 either by the Police Surveillance Team or any other government organisation in New Zealand. He explained that, immediately before he gave that answer, Mr Davison had been asking him about the physical surveillance that the Police had been undertaking of Mr Dotcom on the night of 19 January and had been referring to the contemporaneous logs of Mr Dotcom's movements made by the Police Surveillance Team at that time. He said that the clear import of Mr Davison's line of questioning was to establish that, if the Police had undertaken more extensive visual surveillance of Mr Dotcom in the two weeks leading up to the raid, they would have been able to gather intelligence that would have enabled them to apprehend him without undertaking the raid on his house in the manner in which they did. He said it was therefore clear to him that Mr Davison's question was directed towards visual surveillance, and he answered it in those terms.
26. The Authority unreservedly accepts Detective Inspector Wormald's explanation for both of the answers that are the subject of the complaint. Our own analysis of the transcript of evidence has led us to conclude that Mr Davison's questions were unquestionably directed at the visual surveillance of the movements of those who were the subject of the warrants (and in particular Mr Dotcom). Detective Inspector Wormald's interpretation of the questions being asked of him was accordingly entirely reasonable and his answers were not in any way false or misleading.

FINDING

The evidence given by Detective Inspector Wormald, when read in the context of the nature of the cross-examination at the time, was true and there is no risk that the answers complained about would have misled the Court.

Issue Two: If Detective Inspector Wormald's answers were in fact false, did he intend to mislead the Court?

27. It follows from our finding that Detective Inspector Wormald's evidence was not in fact false, that the second issue, whether he intended to mislead the Court, is redundant. Without false evidence, an attempt to mislead the Court cannot amount to the offence of perjury.
28. However, for the sake of completeness we should record our view that, even if we had concluded that the evidence was in fact false, we would not have found that Detective Inspector Wormald intended to mislead the Court.
29. Prior to the enactment of the Search and Surveillance Act 2012 (which was not in force at the time of the raid on Mr Dotcom's house), there was no legislative regime governing visual surveillance. The Crimes Act provided for the issue of "interception warrants", which allowed the interception of private communications; and the Summary Proceedings Act provided for the issue of "tracking device warrants", which allowed for the installation of tracking devices to enable the tracking of persons or vehicles. Visual surveillance was essentially unregulated.
30. The Search and Surveillance Act 2012 introduced "surveillance device warrants" and warrantless surveillance device powers that governed the use of interception devices, tracking devices and visual surveillance devices. "Surveillance" was therefore given a generic legal definition that did not exist at the time of the Police operation in January 2012.
31. Before that time it was generally understood by Police officers that "interception" was the term applicable to the interception of telecommunications and other conversations, and "surveillance" was the term applicable to the visual surveillance of people or places, either with the naked eye or by way of devices such as binoculars or CCTV. We accept that, even without the context within which Detective Inspector Wormald was asked the questions about surveillance, he would have been likely to interpret that as referring to visual surveillance rather than interception. The suggestion that he intended to mislead the Court is therefore without foundation.

FINDING

Even if we had found that the evidence given by Detective Inspector Wormald was untrue, we would not have found that he had any intention to mislead the Court.

CONCLUSION

32. The Authority has concluded that:

- 1) Detective Inspector Wormald's evidence to the Court during the judicial review proceedings brought by Mr Dotcom was not false or misleading; and
- 2) in any event, he had no intention to mislead the Court.

A handwritten signature in black ink, appearing to read 'David Carruthers', written in a cursive style.

Judge Sir David Carruthers

Chair
Independent Police Conduct Authority

6 August 2015

ABOUT THE AUTHORITY

Who is the Independent Police Conduct Authority?

The Independent Police Conduct Authority is an independent body set up by Parliament to provide civilian oversight of Police conduct.

It is not part of the Police – the law requires it to be fully independent. The Authority is overseen by a Board, which is chaired by Judge Sir David J. Carruthers.

Being independent means that the Authority makes its own findings based on the facts and the law. It does not answer to the Police, the Government or anyone else over those findings. In this way, its independence is similar to that of a Court.

The Authority employs highly experienced staff who have worked in a range of law enforcement and related roles in New Zealand and overseas.

WHAT ARE THE AUTHORITY'S FUNCTIONS?

Under the Independent Police Conduct Authority Act 1988, the Authority:

- receives complaints alleging misconduct or neglect of duty by Police, or complaints about Police practices, policies and procedures affecting the complainant in a personal capacity;
- investigates, where there are reasonable grounds in the public interest, incidents in which Police actions have caused or appear to have caused death or serious bodily harm.

On completion of an investigation, the Authority must form an opinion about the Police conduct, policy, practice or procedure which was the subject of the complaint. The Authority may make recommendations to the Commissioner.



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