

**IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)**

**CR NO's 71-78/2020
(724-727/2019)**

BETWEEN	TEOKOTAI NOO GEORGE	Informant
AND	HENRY PUNA	Defendant
AND	MARK BROWN	Defendant

Date of Reasons: 10 March 2020 (CIT)

Counsel: Mr N George for the Informant
Ms K Bell for the Crown

**REASONS AND DIRECTIONS OF THE HONOURABLE JUSTICE COLIN
DOHERTY FOR THE ISSUE OF SEARCH WARRANTS**

Reasons

1. The informant has filed “private” prosecutions alleging conspiracies to defraud on the part of the defendants (section 280 Crimes Act 1969) and the improper payment of public monies (section 64(2)(d)(i) Ministry of Finance and Economic Management Act 1995–96). The defendants are the Prime Minister and Deputy Prime Minister respectively.
2. On 10 March 2020 (CIT) I issued seven search warrants, effectively in favour of the informant.
3. Generally, search warrants are *ex-parte* matters and issued by the Court without reasons. However, in this case as this is apparently the first time in the Cook Islands that search warrants have been issued in respect of a private prosecution, I thought it appropriate that the reasons be given.
4. The case is not just unique because it is a private prosecution but also because the Crown opposed the application.

5. The Crown has no role in the prosecution, but the profile of the prosecution and the fact that the Crown has been overseeing applications by the informant under the Official Information Act 2008 (OIA) for documentation now sought under this application, means the Crown has a continuing interest by reason of the public interest in ensuring the confidentiality of Government and Cabinet business.
6. The application fell to be determined pursuant to section 96 of the Criminal Procedure Act 1980–81 (CPA). Ultimately, (after the third affidavit of Paul Allsworth) I was satisfied there were reasonable grounds for believing that the documents sought were or might be in existence and that if so, they could be evidence going to the commission of the crimes alleged. I note that search warrants can only issue in respect of the conspiracy charges.
7. The existence of the specific documents has by and large been confirmed by the Crown, because of its involvement with locating the same in relation to the OIA applications.
8. In relation to search warrants, the CPA is structured on the assumption that Police is the prosecutor, or involved in some way in the prosecution (e.g. as an investigator on behalf the Crown). That may or may not be problematic in a private prosecution depending upon the whim of Police.
9. In particular, a search warrant itself, while being directed to a named constable or generally to every constable, does not direct that constable to execute the warrant. By virtue of section 96(3) the warrant merely authorises the constable to act (execute) in a manner to give effect to the warrant. The upshot is that while a search warrant may be issued there is no guarantee that it will be executed. I accept the submission of the Crown that the discretion remains with the constable to whom it is directed.
10. In practice in Police criminal prosecutions while a search warrant may have been issued and its execution authorised, Police may obtain evidence in other ways and therefore decide not to execute it. One would hope that in a private prosecution Police would act with good faith and propriety and execute within a reasonable time. But that may not necessarily be so, given the priority that might be afforded to competing police business. It is important in this case that the warrants are executed in a timely manner given the commencement of trial is imminent. To this end, the issue of timely execution of the warrants is best managed by the trial judge and therefore I have imposed a reporting condition on Police. Additionally, (depending upon the class of document) it shall be the responsibility of Police to make those documents seized available to either Counsel for the informant or the Crown.

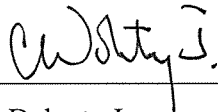
11. The Crown raised issues around the public interest in the confidentiality of Government and Cabinet business. Since the original application was filed, the class of documents sought by the informant has now been considerably narrowed and the only documents sought that might reasonably be in the “Government and Cabinet business” class, are text messages between the defendants.
12. In general, in the execution of a search warrant where organs of the state such as the Crown or Cook Islands Police are in control of seized documents, there can be confidence in the absence of collateral use of documents seized even though they may not be directly relevant to the proposed prosecution. Without casting any aspersions on the integrity of the informant in this case, the same cannot be said for general members of the public. The general public does not have the existing conventions of propriety and fairness these state institutions do. I agree with the Crown that there is a general public policy issue around confidentiality to be managed in circumstances of private prosecutions. In this case I am of the view that can be managed by an appropriate condition and direction as to how documents that might contain confidential information are handled.
13. Section 96(3)(a) CPA authorises the use of “such assistants as may be necessary” to assist in execution of the warrant. Even although the documents sought are specifically identified (and might be made available at the front counter), theoretically the physical searches required to execute some of the warrants will entail entry of the offices of public bodies including the office of the Clerk of Parliament, the office of the Official Secretary to the Queen’s Representative and the office of Cabinet Services. As Police have no specific interest in the prosecutions the availability of Mr Allsworth, who is a licenced private investigator and who has an intimate knowledge of the informant’s case and general public sector processes, to assist in the location and identification of documents is appropriate should Police require assistance.
14. To deal with the specific issues mentioned above I have included conditions on each of the search warrants. While section 96 CPA does not specify that conditions may be attached to a search warrant, it does not prohibit them. I note that the High Court of New Zealand in *Dotcom v Attorney-General* [2012] NZHC1494, [2012] 3NZRL115, when dealing with the then New Zealand counterpart to section 96 CPA, contemplated imposing conditions relating to the cloning of computers. For the reasons set out in *Dotcom*, I am of the view that in respect of section 96 CPA, there ought to be an ability on the part of the issuer of search warrants in this jurisdiction to apply such conditions as are necessary to achieve any necessary balance between

the rights of an applicant for a search warrant and the person whose property is the subject of the warrant.

15. The general purport of those conditions attaching to the warrants are that:
- a. Cook Islands Police file a report with the Registrar of the High Court addressed to the Chief Justice within five working days of the receipt of the search warrants from the Registrar as to the progress on execution of each of them;
 - b. all documents seized under the warrants be delivered forthwith to either Counsel for the informant or, in the case of certain documents, the Crown; and
 - c. Mr Paul Allsworth is authorised to assist Police in the execution of each of the search warrants should Police require assistance.

Directions

16. I direct that:
- a. in respect those documents evidencing text messages between the defendants, Counsel for the informant and Crown Counsel shall consult and determine what evidence is relevant to these prosecutions. Any disputed document shall be referred to the trial judge to rule on relevance and thus, admissibility. Those text records accepted as relevant shall immediately be made available to Counsel for the informant.
 - b. A copy of these reasons and directions accompany the search warrants when the latter are directed/delivered to Police.



Colin Doherty J