

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA670/2017
[2018] NZCA 345**

BETWEEN DERMOT GREGORY NOTTINGHAM
 Applicant

AND DISTRICT COURT AT AUCKLAND
 First Respondent

MARTIN HONEY, STEPHANIE HONEY
AND HEMI TAKA
Second Respondents

CA733/2017

BETWEEN DERMOT GREGORY NOTTINGHAM
 Applicant

AND HEMI TAKA, MARTIN HONEY AND
 STEPHANIE HONEY
 Respondents

Hearing: 7 August 2018

Court: Asher, Brown and Clifford JJ

Counsel: Applicant in Person
 D W Grove for Respondents Mr and Mrs Honey

Judgment: 3 September 2018 at 3.30 pm

JUDGMENT OF THE COURT

A The application in CA670/2017 for leave to appeal against the decision in the High Court refusing leave is declined.

B The application in CA733/2017 for leave to appeal against the decision in the High Court refusing to grant an extension of time to appeal against a costs order is declined.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] The applicant, Dermot Nottingham, has two applications before the Court. In the first application, CA670/2017, he applies for leave to appeal a decision of Davison J in the High Court refusing leave to bring an appeal on a question of law under s 296 of the Criminal Procedure Act 2011 (CPA).¹ In the second application, CA733/2017, he applies for leave to appeal a decision of Downs J in the High Court refusing to extend time to appeal against a costs order.² Both applications arise out of a private prosecution brought by Mr Nottingham against the respondents in the District Court. The applications have proceeded and been heard together in this Court.

Background

[2] In 2014 Mr Nottingham commenced a private prosecution against the respondents, Mr Martin Honey, Mrs Stephanie Honey and Mr Hemi Taka. The charges arose out of claims by Mr Nottingham that the respondents had operated a fraudulent real estate website. There was also a charge of perjury. After a 17-day judge-alone trial, Judge Paul dismissed the charges on the basis that there was no case to answer.³ He acquitted the respondents and made an order that Mr Nottingham pay them costs totalling \$117,000 under the Costs in Criminal Cases Act 1967.⁴

[3] After the delivery of Judge Paul's decision on costs, Mr Nottingham filed a notice of application for leave to appeal in the High Court under s 296 of the CPA. This provides for appeals by leave on questions of law. The notice of application for

¹ *Nottingham v District Court at Auckland* [2017] NZHC 1715 [*Davison J decision*].

² *Nottingham v Honey* [2017] NZHC 2921 [*Downs J decision*].

³ *Nottingham v Honey* [2016] NZDC 9272.

⁴ *Nottingham v Honey* DC Auckland CRI-2014-004-3937, 13 July 2016.

leave challenged Judge Paul's dismissal of the charges and the costs order. On 24 July 2017, Davison J declined Mr Nottingham's application for leave to appeal on the basis that no questions of law were raised.⁵ Mr Nottingham has filed a notice of application for leave to appeal Davison J's decision to this Court, and that is the CA670/2017 proceeding that is before us.

[4] After Davison J's decision was released, Mr Nottingham filed an application for leave to appeal out of time against Judge Paul's costs decision under s 271 of the CPA. The appeal was filed more than a year out of time. In a decision dated 28 November 2017, Downs J declined the application for an extension of time. He found that the private prosecution was "fundamentally flawed" and that Mr Nottingham's proposed appeal constituted a re-litigation of an issue already decided against him by Davison J, and was an abuse of process.⁶ Mr Nottingham has filed an application for leave to appeal Downs J's decision in this Court. That is the proceeding in CA733/2017 that is before us.

[5] In the early case management stages it was determined that there were issues as to whether this Court has jurisdiction to hear either application. Winkelmann J directed that the jurisdictional issues should be heard and determined prior to any substantive hearing of the applications. In a minute of 28 February 2018, she identified the two jurisdictional issues as follows:⁷

[4] In respect of CA670/2017, the issue arises as to whether there is an ability to appeal the first appeal court's refusal to grant leave to appeal, either as a question of law under s 296, or otherwise.

[5] In relation to CA733/2017, the issue is whether there is a right to appeal a refusal to extend time to appeal.

This judgment addresses those two jurisdictional issues.

[6] Mr Nottingham represented himself as prosecutor in the District Court, and has represented himself in the various applications that have followed and on appeal before us.

⁵ *Davison J decision*, above n 1, at [136].

⁶ *Downs J decision*, above n 2, at [10] and [11]–[14].

⁷ *Nottingham v District Court at Auckland CA670/2017, Nottingham v Taka CA733/2017*, 28 February 2018 (Minute of Winkelmann J).

CA670/2017

[7] Part 6 of the CPA sets out a regime for criminal appeals. In subpt 1, provision is made in relation to some general matters, and then between subpts 2 and 11 detailed provision is made for appeals against particular types of decisions in criminal cases. The subpts include provision for appeals against conviction and sentence, appeals against decisions on costs orders, and appeals on questions of law. In subpt 12 there are further general provisions. In relation to defendants who are facing charges or have been convicted, there are rights of appeal without leave in relation to certain decisions. In particular, at subpts 3 and 4 there is a right to appeal conviction and sentence without leave to the first appeal court. Further there is a right to appeal without leave against decisions on costs orders provided for in subpt 6. These subparts also provide for a second appeal by leave.

[8] In contrast to the rights of defendants, pt 6 of the CPA provides only limited rights of appeal for prosecutors in criminal cases. In particular there is no general right of appeal without leave against acquittals. There is, however, an ability to appeal on a question of law only, but with leave. Section 296 provides:

296 Right of appeal

- (1) This section applies if a person has been charged with an offence.
- (2) The prosecutor or the defendant may, with the leave of the first appeal court, appeal under this subpart to that court on a question of law against a ruling by the trial court.
- (3) The question of law in a first appeal under this subpart must arise—
 - (a) in proceedings that relate to or follow the determination of the charge; or
 - (b) in the determination of the charge (including, without limitation, a conviction, an acquittal, the dismissal of the charge under section 147, or a stay of prosecution).
- (4) The question of law must not be one that—
 - (a) arises from a jury verdict; or
 - (b) arose before the trial and has already been decided under subpart 2.

[9] Section 296(2) provides that a prosecutor may only appeal with the leave of the first appeal court. In this case the first appeal court was the High Court. The application came before Davison J, and he declined leave in a fully reasoned judgment extending to 137 paragraphs.⁸

[10] Section 213(2)–(4) of the CPA provides:

213 Leave to appeal

...

- (2) Leave to appeal to any court other than the Supreme Court under this Part is required only if leave is expressly required by this Part or any other Act.
- (3) *An appeal court's decision to give or refuse leave for the purposes of this Part is final unless otherwise expressly provided by this Part or any other Act.*
- (4) The duty of an appeal court to determine an appeal is subject to any leave requirements being met.

(Emphasis added.)

[11] In relation to s 213(2), s 296 expressly provides that leave is required. Section 213(3) is the important section for the purposes of this appeal. It provides that an appeal court's decision, in this case that of Davison J in the High Court, giving or refusing leave for the purposes of pt 6 of the CPA is final, unless otherwise expressly provided for by that part of the Act or any other Act.

[12] Mr Nottingham submitted to us that s 213(3) does not apply to this proposed appeal as it applies only to “this part”. He invited us to read “this part” as a reference to subpt 1 of pt 6, which sets out general matters relating to appeals. However on its plain words “this part” clearly means the whole of pt 6 relating to appeals. “Part” cannot be read as “subpart”. Throughout pt 6 there is specific reference to “subparts”. Thus, on the face of s 213(3), this Court has no jurisdiction to hear any challenge to Davison J's decision to refuse leave.

⁸ *Davison J decision*, above n 1.

[13] Mr Nottingham also relied on s 303 of the CPA. Section 303 provides:

303 Right of appeal against determination of first appeal court

- (1) A party to a first appeal under this subpart may, with the leave of the second appeal court, appeal under this subpart to that court against the determination of the first appeal.
- (2) The High Court or the Court of Appeal must not give leave for a second appeal under this subpart unless satisfied that—
 - (a) the appeal involves a matter of general or public importance; or
 - (b) a miscarriage of justice may have occurred, or may occur unless the appeal is heard.

[14] Mr Nottingham submitted that the High Court decision of Davison J constituted a “determination of the first appeal”, and therefore s 303(1) applied. He also argued that the acquittal of the defendants had been a miscarriage of justice and therefore leave for a second appeal should be granted.

[15] We cannot accept that submission. The qualifying words “of the first appeal” are unambiguous. There must have been a first appeal. In this matter the first appeal was not heard and not determined. Matters in the High Court did not reach that stage because leave to bring such an appeal was declined.⁹

[16] We have also considered whether there has been a “determination” for the purposes of s 303. Section 300 describes the ways in which a first appeal court can determine an appeal:

300 First appeal court to determine appeal

- (1) A first appeal court must determine a first appeal under this subpart by—
 - (a) confirming the ruling appealed against; or
 - (b) doing any of the following if the court considers the ruling is erroneous and, in the case of the person’s conviction or acquittal or of a direction by a court to stay the prosecution or

⁹ We also note the decision of this Court in *Anderson v R* [2015] NZCA 518, [2016] 2 NZLR 321, which considered these provisions. However, in that case the decision appealed against was construed as a decision to grant leave but dismiss the appeal on the basis of an absence of jurisdiction. It is not therefore applicable.

to dismiss the charge under section 147, also resulted in a miscarriage of justice:

- (i) setting aside the conviction and entering an acquittal, if the person has been convicted; or
- (ii) directing a new trial, in any case; or
- (c) varying or substituting the sentence or remitting the sentence to the sentencing court with directions, if the decision relates to sentence and the court thinks the decision is erroneous; or
- (d) remitting the matter to the trial court in accordance with the opinion of the appeal court; or
- (e) making any other order that the court considers justice requires.

...

[17] Declining leave is not listed as a way in which the first appeal court “determines” the appeal. Plainly s 300 refers to determinations of actual appeals and not to leave decisions. We have considered whether s 300(1)(e), which provides that a court may determine the first appeal by “making any other order that the court considers justice requires”, could be read as including a refusal to grant leave to appeal. We have concluded that it cannot. Section 300(1)(e) presupposes that there is a first appeal underway. No first appeal commenced in this case. It did not get past the leave stage.

[18] Plainly therefore s 303(1) does not apply. There has been no determination of the first appeal. Section 213(3) states that a decision granting or refusing leave is final “unless otherwise expressly provided for by this Part” and we do not construe s 303(1) as being any such express provision. To the contrary, it makes no reference to the declining of an application for leave to appeal. It refers only to determined appeals.

[19] Consistent with the view we have taken we note that *Adams on Criminal Law* states “[t]here is no ability to appeal the first appeal court’s refusal to grant leave to appeal.”¹⁰

¹⁰ Simon France (ed) *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CPA 303.01].

[20] We also note that the Supreme Court has recently said in relation to an attempt to appeal this Court's refusal of leave:¹¹

[5] Under s 213(3) of the Criminal Procedure Act 2011, the judgment of the Court of Appeal dismissing the application for leave to appeal is "final", which precludes an appeal to this Court from that decision. ...

[21] We must conclude that there is no jurisdiction for this Court to consider the application for leave under CA670/2017.

[22] We note that there is good reason for a restricted ability to appeal under s 296. Section 296 provides the only mechanism for a prosecutor to challenge a trial ruling which has led to an acquittal by leave and on a point of law only. In contrast, defendants may appeal against conviction without leave. It is unsurprising that there should be limits on a prosecutor mounting an appeal against a decision that has led to an acquittal. Otherwise acquitted defendants would have the threat of renewed proceedings hanging over them while the prosecutor exhausts appeal avenues. As a matter of policy, Parliament has long determined that there should be an inequality of arms in criminal appeals, in the defendant's favour.¹²

[23] The position under s 296 is to be contrasted with the Solicitor-General's reference procedure under subpt 11 of the CPA. Section 313 empowers the Solicitor-General to refer a question of law to this Court, with leave. Section 315 expressly provides that the Solicitor-General may, with leave of the Supreme Court, appeal to that Court against a decision of this Court refusing leave under s 313. In contrast with appeals under s 296, a reference under subpt 11 does not affect the proceedings to which the reference relates.¹³ The successful defendant is not at risk of a reversal of the acquittal, and the concern about further appeals hanging over the defendant therefore does not arise.

¹¹ *Brown v Police* [2017] NZSC 121.

¹² See the preceding regime in pt 13 of the Crimes Act 1961.

¹³ Criminal Procedure Act 2011, s 314(6).

CA733/2017

[24] The issue in this application is whether Mr Nottingham can appeal Downs J's judgment refusing to extend time to appeal.

[25] As we have set out, Mr Nottingham did not immediately pursue his right to appeal against a costs order under subpt 6 of pt 6 the CPA. Rather he made that challenge in his application for leave to appeal under s 296 of the CPA heard by Davison J. It was only after that judgment was issued that he sought an extension of time to appeal under s 271 of the CPA. Under s 271 there is clear provision for appeals against costs orders made against prosecutors. Section 271 gives any person affected by such an order, or refusal to make an order, a right of appeal. Leave is not required. But it must be filed in 20 working days and this was not done. Downs J determined that he would not grant an extension of time to enable Mr Nottingham to avail himself of that appellate pathway. The issue we must determine is whether this Court can hear an appeal against Downs J's refusal to extend time.

[26] Section 273 describes how to commence an appeal against a costs order. It provides:

273 How to commence first appeal

- (1) A person commences a first appeal under this subpart by filing in the first appeal court—
 - (a) a notice of appeal, if the court appealed to is the District Court, High Court, or Court of Appeal; or
 - (b) a notice of application for leave to appeal, if the court appealed to is the Supreme Court.
- (2) A notice of appeal or notice of application for leave to appeal must be filed within 20 working days after the date of the decision appealed against.
- (3) The first appeal court may, at any time, extend the time allowed for filing the notice of appeal or notice of application for leave to appeal.

[27] It can be seen that s 273(3), while providing for the first appeal court to extend the time allowed for filing a notice of appeal or a notice of application for leave to appeal, contains no reference to any right of appeal against that or a further application to a higher court.

[28] The same or similar wording for an extension of time is used in relation to all the other appellate pathways created by pt 6 of the CPA. None of them contains any provision for a right to challenge any refusal to grant an extension of time by the first appeal court.

[29] This position is consistent with that which prevailed prior to the CPA. In relation to the preceding regime under the Summary Proceedings Act 1957, it was held on a number of occasions that where a High Court judge refused an application for an extension of time, there were no further steps available to challenge that finding in the Court of Appeal. Thus in *O'Byrne v Waimakariri District Council* it was held:¹⁴

[6] The issue has arisen previously in *Taufoou v Department of Labour* and *Tocker v Police*. Those cases confirm that jurisdiction under s 144 of the Summary Proceedings Act arises only when there has actually been an appeal heard in the High Court. It does not apply to an interlocutory matter. Here, Chisholm J declined to grant an extension of time. That is accordingly the final step available to Mr O'Byrne.

[30] That position was confirmed in *Douglas v R*:¹⁵

[7] This Court recently confirmed that, where a High Court Judge refuses an application for an extension of time, no further steps will be available to the applicant by way of a challenge in this Court.

[31] The plain words of the leave provision, and the absence of any reference to a right of further challenge, confirm that this continues to be the position under the CPA.

[32] It follows that this Court has no jurisdiction to hear any challenge to Downs J's refusal to extend the time allowed for the filing of the notice of appeal against the costs decision.

Result

[33] The application in CA670/2017 for leave to appeal against the decision in the High Court refusing leave is declined on the basis that the Court has no jurisdiction to hear such an application.

¹⁴ *O'Byrne v Waimakariri District Council* [2012] NZCA 374, [2012] NZAR 848 (footnotes omitted).

¹⁵ *Douglas v R* [2014] NZCA 219 (footnotes omitted).

[34] The application in CA733/2017 for leave to appeal against the decision in the High Court refusing to grant an extension of time to appeal against a costs order is declined on the basis that the Court has no jurisdiction to hear such an application.

[35] We note that the respondents Mr and Mrs Honey have sought costs on the applications. However, given that there was no clear authority on the lack of jurisdiction for either application, we consider it would be inappropriate to award costs against Mr Nottingham in this Court.

Solicitors:

Foy & Halse, Auckland for Respondents Mr and Mrs Honey