IN THE SUPREME COURT OF NEW ZEALAND SC 103/2009

BETWEEN **PETER MORRISON PETRYSZICK**
Appellant

AND **THE QUEEN**
Respondent

Hearing: 23 July 2010
Coram: Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Appearances: The Appellant appears in Person
D B Collins QC with C J Curran and P D Marshall for the Respondent
G J King as Amicus Curiae

CRIMINAL APPEAL

ELIAS CJ:
Yes Mr Petryszick, you appear in person.

MR PETRYSZICK:
Yes.

ELIAS CJ:
Did I pronounce your name...

MR PETRYSZICK:
Oh, close enough.

ELIAS CJ:
Say it.

MR PETRYSZICK:

Petryszick.

ELIAS CJ:

Petryszick.

MR PETRYSZICK:

It's actually a long story it should be Z-A-K at the end but my birth certificate, when I changed it by deed poll from Peter Morrison Strange, in 1999 I think it was, I put the spelling on the birth certificate which was actually wrong.

ELIAS CJ:

All right I have a similar problem with my birth certificate, thank you.

MR PETRYSZICK:

You can see why it's been changed from Peter Morrison Strange when you get a load of innuendos.

ELIAS CJ:

All right, thank you, Mr Petryszick.

SOLICITOR-GENERAL:

Together with Mr Curran and Mr Marshall, I appear for the respondent, Your Honour.

ELIAS CJ:

Thank you Mr Solicitor, Mr Curran, Mr Marshall.

MR KING:

May it please Your Honour, I appear as Amicus.

ELIAS CJ:

Yes, thank you Mr King. Yes Mr Petryszick.

MR PETRYSZICK:

Shall I stand here or...

ELIAS CJ:

Yes go up to the – because then we can record it.

MR PETRYSZICK:

As you can see, I've just recently been released from prison, so I've sort of been there for two years now, half of it was for a sentence and half of it was remanded in custody. After I'd completed sentence I was having a bit of time sort of trying to adjust back into normal society, where things aren't sorted out with fists as in a prison cell. So excuse me for being a bit flamboyant about the way I do things.

I'm not really too sure what I'm doing. I do know what the problem is and I do know that the Crown Solicitor breached the principle of *R v Hart* [2009] NZSC 104. The issue has been an outstanding one for quite some time and I've made that very clear right from the start that I wanted the transcripts, and they gave me the transcripts of the closing argument and as soon as I got them I realised that they'd been doctored. So immediately after that I was pushing to get the tape and when I got released from jail we had a hearing before Justice Hammond and I made it clear that I needed the tape.

There were a lot of things that went on in that hearing and stuff. I mean you can read that. I'll just keep it brief. So I entered the submissions on time and stuff on time and stuff, for the tape. I got mucked around, mucked around and then the Court of Appeal's got ahold of the tape and then, I mean, you can have a look at the letters and stuff in here. It's all pretty easily spelt out, it's all A, B, C, but I don't know whether you've got copies of stuff, but I can have that arranged for you guys to have copies because there's all the paperwork that goes with the submissions from the original submission. And then Justice Glazebrook ruled that she'd had a phone conference with me, which never happened, and I was in Mt Eden Prison at the time, remanded in custody, and you've got to understand that all this was all done from a bed essentially, at Mt Eden prison so that's why a lot of it's handwritten.

ELIAS CJ:

Now Mr Petryszick, are you wanting to put material to before us because the point upon which leave has been given, because as you will appreciate, this is not a Court that entertains appeals as of right.

MR PETRYSZICK:

Yes.

ELIAS CJ:

So leave has to be given, and the point that has been set down is whether you were denied your right to a further appeal.

MR PETRYSZICK:

This is the point I'm leading up to, yes.

ELIAS CJ:

Yes.

MR PETRYSZICK:

Well, just before they had the appeal hearing, Justice Hammond had the file and then within about, I could whistle though here and find the letter I think you guys – it's all on the list here for the original stuff. It's fairly obvious that she's given the file to Justice Hammond and then within a period of within, like 48 hours it's been side-shifted off to Justice Glazebrook and then Justice Glazebrook, my personal opinion is, okay I'll say it's hearsay, but my personal opinion is I think Hammond's read it and I think Justice Hammond has actually listened to the tape and then moved it on and then Justice Glazebrook, she ruled, there's a short minute there which I think would be very last minutes, I think there's four rulings there. The last one there, she's saying that we've had phone conference, which we didn't have and any, the submissions that I've done for the paperwork and stuff like that, we'll sort that out at the hearing. Well that was no use to me because I still haven't got the tape and there's a letter that was forwarded, according to Justice Chambers' decision there, a letter that I'd sent, as far as my instructions are, and if you actually read that letter, I've made it very clear, "Get the tape, get the tape, get the tape."

Comeskey and Jesse Soondram I think it is, they just went in there with a couple of silly little things that really were in - you know, inconsequential apart from the bigger picture, I needed that tape.

ELIAS CJ:

So is your principal concern that you weren't in a position to meet the Court's deadlines and file your submissions because you didn't have the tape?

MR PETRYSZICK:

Well I can't – it would make me look like a fool if I'm trying to go to the Court of Appeal, claiming that this is there, without the tape to back it up and to be able to work of the tape. The issue has been on the table before I was even sentenced and I didn't realise until I found this the other day, here's a letter here dated 11th of April 2008 and it's from the Crown Law Office, from a Cameron Mander, Deputy Solicitor-General, "Dear Mr Petryszick, Ms Patterson, Crown Solicitor, our reference: SM1210/3. Thank you for letter 1st of April 2008 expressing your concerns as to Ms Patterson's conduct during your recent jury trial."

Now, where the problem lies with that closing argument is that she made it very clear to the jury –

ELIAS CJ:

Just pause a moment, I'm trying to see the pattern of what –

MR PETRYSZICK:

Oh, sorry.

ELIAS CJ:

– it's leading up to. How does this –

MR PETRYSZICK:

I was sort of explaining what's actually on that tape as to why we need it because the transcripts have been edited.

ELIAS CJ:

Yes, I see.

MR PETRYSZICK:

So they gave us the transcript earlier on, and if you look at, and I put this to Justice Chambers when I was down at Rangipo Prison doing the sentence for that back in 2008, and he's written on his rulings, he didn't say what the problem was, but he went on about me being delusional or something, and I can't remember the exact words, but wrote me off as an idiot. Now, I had a very, very credible witness, Dave Crequer, who's submitted an affidavit saying that he's listened to that transcript and all the references that she's made to me being a liar, therefore the independent witness, the witness there, because the witness that the police denied existed until she turned up in Court, that because they'd proven me a liar, that made her a liar. But she didn't just say it once. She rehearsed it so it got stuck in the long-term memory for the jury and by the time she'd finished saying that I was a liar, we'd colluded our stories and just went on and on and on and on and on. That was all that was ringing in everybody's ears and Judge de Ridder sat there and listened –

ELIAS CJ:

All right, just pause a moment. We do understand that the non-availability of the tape was a matter you considered of great moment in terms of your ability to progress your appeal.

MR PETRYSZICK:

Yes, well considering the fact that Patterson, Muston, Muston was a lawyer, Patterson was Crown Solicitor and Judge de Ridder was the Judge, the same three people, only about a month before my trial had another – ran exactly the same, dare I say it, dodgy trial, which is the *R v Auckram* [2007] NZCA 570 case that's filed with there as well.

ELIAS CJ:

It's irrelevant to what we have to consider.

MR PETRYSZICK:

Yes I know, I know, but what I'm saying is, is that's what alerted me to the fact of that breach of the principle in *R v Hart* because that became an argument for the Court of Appeal as well. So they've done this a month before and it had been a problem then and Muston sat back and let it happen again. So he knew what he was going on, he denies everything, doesn't want to know, he's sort of fingers in the air.

ELIAS CJ:

All right, but that's all background, but the point you're making is that the tape wasn't -

MR PETRYSZICK:

I couldn't enter the submissions until I got accurate transcripts or the tape, and it was fairly clear that the Court of Appeal were not too keen on handing the tape over, because it proves two things basically. Whether it proves my innocence or not, it doesn't matter. It proves that the Crown doctored the transcripts and that's not healthy. That's not healthy in our society. We don't need dodgy stuff like that around. So basically, that's essentially it. I needed those tapes, plus there was other stuff as well for the 111 call and there's, Your Honour, Mr McGrath has already sat on an appeal that I did, which is *R v S* (2002) 19 CRNZ 442 (CA). They didn't even attach Strange to it, because I was Peter Morrison Strange then, where they ran exactly the same thing with Mr McGrath and I think Justices Durie and Robertson, throughout in 2002 and that's all been petitioned and stuff. There's a copy of it that's loaded with these files as well.

ELIAS CJ:

It's not relevant to what we have to decide however.

MR PETRYSZICK:

I know but the thing is, it's not the first time. This isn't just a one-off occasions. This is, you know, I haven't had a criminal conviction now I think, it must be getting close to probably 10, 11 years. I've never had a drink-driving. I try to do my best to respect the law as much as I can, yet every time I have a mild little fender-bender, all of a sudden it turns in to being road rage and I'm in Court, it's all over the front page of the paper and it just destroyed my life. It destroyed my partner, she left and ran off with another guy, and it's just been a nightmare.

It's been a case of psychological abuse. I think the intention was, is that maybe I'd be stupid enough to fall for the trick and go and do something actually dumb, like lose the plot with somebody and really do something. Well I haven't done anything like that and what I did, is

once I sort of got the 2002 one over and done with because I did jail time and got out and got acquitted and moved on, in 2004 I started at Auckland University –

ELIAS CJ:

Just pause –

MR PETRYSZICK:

I'm just giving a little bit of background of who I am.

ELIAS CJ:

I understand that it's background but it's not really material that we can use in this hearing.

MR PETRYSZICK:

Oh, yes, but the picture that's been painted though is that I'm a dangerous, violent thug that sorts his problems out with violence.

ELIAS CJ:

No, that's not what we are concerned with here.

MR PETRYSZICK:

No, no.

ELIAS CJ:

So you don't need to answer any suggestion that you think is being made because the only question for us is whether the Court of Appeal denied you your right to an appeal.

MR PETRYSZICK:

Yes, I just want that to be heard. That's all I want. I want the – I'd like the tape and the information I've asked for and then we can present it to the Courts without all the hoo-ha and Legal Aid Services and everybody else playing their little games and putting blocks up and remanding me in custody for silly things and doing everything they can to stop. If I can get the tape I think it's pretty much a clear cut case if you hear the tape and if the tape is all whole, then you're not going to like what you hear.

She got desperate. She realised that this witness did turn up and did give evidence and her story was exactly the same as mine. If you read the transcripts of the lady in question that gave the evidence, she made it very clear that she's completely independent of me. I made it very clear before the trial that we didn't even discuss the case. She discussed it with my lawyer and I was very, very pedantic about that, because she's an upstanding woman that saw something wrong.

ELIAS CJ:

But the tape is directed at what the Crown Prosecutor said.

MR PETRYSZICK:

Yes, but the tape is directed at her and at me for our credibility. So she convinced a jury that we'd lied, colluded our stories and all this stuff, but it wasn't just once, it went on and on and on. She rehearses it and I think they sort of did, I don't know, it's a bad analogy but the new female Prime Minister of Australia, they're sort of saying the same thing about her with her speech and stuff, how she's rehearsed things. So that's all you remember. Well that's what she'd done.

ELIAS CJ:

All right, I understand that. But the single point is that the tape wasn't available and the 111 transcript.

MR PETRYSZICK:

Yes and the 111 transcript. That could possibly be a problem because quite a bit of time's gone by but I don't think that tape should be missing, and I had a puzzle – I'm not too sure who that's got – where I was told that the Court of Appeal had actually lost my complete file. But I'm of the understanding they've actually found again now, so there quite a bit there.

ELIAS CJ:

Well I think we seem to have quite a lot of the file.

MR PETRYSZICK:

And you can understand the amount of work and effort that I've put in personally for this. To try and get it done, I've kept diaries of every day while I was in prison, what I was doing, the phone calls, people I spoke to and the running round, and I think if you had a look through the diaries, you'd appreciate the running around I had just to get a lawyer. And Mr Comeskey, I don't know, he was very vague about it. He sort of agreed to do it but then he wouldn't sign paperwork to say that he was acting for me and it sort of dragged on and dragged on.

ELIAS CJ:

We have that sequence pretty well on the material that we've been given.

MR PETRYSZICK:

Yes.

ELIAS CJ:

And how the matter eventually was dealt with and you've had those chronologies that the Crown has prepared have you?

MR PETRYSZICK:

I just got given it now. I haven't really had a chance to look at it because if I start looking at things like that now, I'm going to get sidetracked and not sort of concentrate on the main issue.

ELIAS CJ:

All right, well is there anything more that you want to say to us until you've heard from other counsel about the legal point that we're really concerned with here?

MR PETRYSZICK:

Well, it's got all the rulings in there for the, um, human rights issue and all that that sort of, so do you need me to just sort of go on about that or?

ELIAS CJ:

Is there anything you want to tell us about the, the legal point about whether you had a hearing in accordance with law, that's really the issue that we have to grasp here?

MR PETRYSZICK:

I'm not a professional on this and haven't got access to the rulings and stuff, but I did get some sent in, which are listed with the, with the documents here, but you know, I don't want it to be said that I came in here thinking I could act on my own. The only reason I'm here is because they refuse to allow Eugene Orlov back on my behalf and every other lawyer that I contacted, and I contacted Barry Hart and quite a number of others and spoke to them all at length while I was in prison and stuff like that, while they could understand my problem and my issues, they didn't want, they didn't want a bar of it, they didn't want to know about it. They didn't want to get involved and they reckon it's just too dodgy, they just didn't wanna know –

ELIAS CJ:

Well, there are, there are –

MR PETRYSZICK:

So I'm just trying to, sort of like, do the best I can.

ELIAS CJ:

Yes, no I understand. There are significant legal issues here.

MR PETRYSZICK:

Yeah.

ELIAS CJ:

Would it be, would it be helpful if we heard from counsel for the Crown and the Amicus that we've appointed, or perhaps in, in reverse order, I'm not sure.

MR PETRYSZICK:

Yeah.

ELIAS CJ:

And see how we get after that?

MR PETRYSZICK:

Okay, just one point I'd like to make though is that there are, the tape being such a big issue. The Court of Appeal have already ruled that they won't be entertaining this, as Glazebrook's already ruled, that they won't be entertaining anything to do with any of the information requested, it said at the hearing, so I don't know whether that still stands if it gets referred back to the Court of Appeal, but I'd actually like an order to the Court to actually have this stuff that I've requested put through and I think it's just a matter of realistically, if you listen to the tape and the tape hasn't been edited or altered, then it's clearly obvious what she's done. She's attacked my credibility and the witnesses' credibility and didn't do it in the dock while we had a chance for recourse and the thing that really concerns me the most is the Judge and my lawyer. My lawyer stood up with his closing arguments. He never refuted anything she said in his closing arguments. It was like, he gave a nice speech and it was really nice, but, and it sounded good at the time, but the whole time, the only thing you could remember, walking out of that Court room, is that they'd proved me a liar and that made her a liar and it was fairly obvious we'd concocted our stories and that, um, this is what she's saying, and that I'd, she'd been bought in as a friend of mine, to, to basically, um, try and get me off, to try and fool the Courts, I think, was her term at the time, well all that's gone from the transcripts.

ELIAS CJ:

And are you saying that that was not put to you in cross-examination?

MR PETRYSZICK:

No, no, no.

ELIAS CJ:

Or to her?

MR PETRYSZICK:

No, that would include stories and stuff like that. No, no, she made it very clear that it was blatantly obvious that we'd had and the jury was, um, I wouldn't like to be rude and say, they were an uneducated jury.

ELIAS CJ:

Well, I don't think you really should make that submission.

MR PETRYSZICK:

No, but you know what I mean, they're not learned, they, they didn't understand that she couldn't do that and I knew straightaway when she started doing that that she's not, that, I knew something was wrong. That's why I lodged the initial complaint with the Crown Solicitor before I even got sentenced back in April 2008.

ELIAS CJ:

All right, well –

MR PETRYSZICK:

So, the problem has always been there, it's just that some of the Justices, like Justice Chambers, chose not to make any mention of it on their things. There's only a slight mention in Justice Hammond's that I refute some of the, in his ruling, that I refute some of the parts of the transcripts, but didn't go into detail and actually say what it actually was. I'd just, I'd just like to have my day in Court and I'd just like to have a hearing and then I can get my life back, um, and –

ELIAS CJ:

All right.

MR PETRYSZICK

Then I should be back in university next year, finishing my degrees and stuff like that so.

ELIAS CJ:

Well, I think what we'll do now is hear from other counsel on the legal point.

MR PETRYSZICK:

Yeah.

ELIAS CJ:

And then if you have anything to add after that we can hear you on it.

MR PETRYSZICK:

Okay, if there's any problems with paperwork, because there's, I mean, I'm not a, a legal anything, but so people, somebody with a bit experience and bit of nous could pick holes in everything I've said, so, um, I'll just, hopefully there's the opportunity that maybe we can enter submissions later and maybe have a phone conference.

ELIAS CJ:

No one's really trying to pick holes in what you've said, because what you've said has been principally background with which we can't be concerned. What we, what we have to consider is whether you were given a hearing according to law.

MR PETRYSZICK:

Yeah.

ELIAS CJ:

And on that point, that is just a legal point.

MR PETRYSZICK:

Yeah.

ELIAS CJ:

So perhaps we'll hear from other counsel and then if there's anything you want to add in response, we'll hear you then.

MR PETRYSZICK:

You can understand from my perspective, what I've seen and what I've been through over the last 15 years, from the Whangarei Police and the Whangarei Courts, so I've got a bit of a negative attitude towards the justice system, but I'm not letting it beat me, um, I've worked hard at university and stuff and got myself to a stage where, um, probably about another 18 months and I'll be able to go through but, I dunno, I seem just to do sort of all right there and I sort of like the environment, I like the people, even though some of them are pretty dodgy there themselves.

ELIAS CJ:

All right, thank you very much. Now, how had counsel imagined that they would proceed, because in some ways it seems to me that we might be assisted by hearing from the Crown first so that Mr King can make any response that, that would be helpful.

SOLICITOR-GENERAL:

I'm entirely in the Court's hands. Mr King and I have only exchanged glances and I'm really entirely in the Court's hands.

ELIAS CJ:

Well, I think Mr Solicitor, it would help us if you went next and then Mr King can pick up any points that need to be made in reply.

SOLICITOR-GENERAL:

Thank you very much Your Honours. Can I just deal with three points which the appellant has raised during the time that he was on his feet? First is that the transcript was made available to the appellant on the 6th of August. The second point is –

ELIAS CJ:

Sorry, this is of the tape?

SOLICITOR-GENERAL:

Yes, I'm sorry, of the transcript of the trial was made available on –

ELIAS CJ:

Oh, I see.

SOLICITOR-GENERAL:

– the 6th of August. The second point is that the reasons which the appellant has said the tape is relevant, were not the two reasons why an adjournment was sought on the appellant's behalf and this matter was heard by the Court of Appeal. And the third point, if I can advise the Court –

ELIAS CJ:

But the tape itself did feature in that?

SOLICITOR-GENERAL:

Not in the two –

ELIAS CJ:

Not in the two –

SOLICITOR-GENERAL:

Not in the two points which were to be explored further.

BLANCHARD J:

What were those points?

SOLICITOR-GENERAL:

One related to whether or not a Court registrar had, and I think the language used in the notice of appeal was, "poisoned the entire jury panel" and the second related to the appropriateness of the search warrant that was obtained to get the cellphone records of the appellant relating to the time of the incident. The appellant's explanation, as I understand it, being that he was answering a cellphone and that that provided an innocent explanation for the events that had transpired. And the third point I wanted to make to Your Honours is that a diligent search has been made for the 111 tape and nothing has been able to be located.

TIPPING J:

Mr Solicitor, at any stage has there been a challenge to the summing up?

SOLICITOR-GENERAL:

The notice of appeal is under tab 1 of the case on appeal. It lists 10 numbered grounds of appeal.

TIPPING J:

I couldn't see one. That's why I...

SOLICITOR-GENERAL:

I was just checking Your Honour and grounds numbered 2 through to 4, related to the two points which counsel for the appellant wanted –

TIPPING J:

Yes.

SOLICITOR-GENERAL:

– time to explore further, 2 through to 4 inclusive. Sorry, the language was that the entire jury –

TIPPING J:

Well, to be fair, this point 7, I don't think I, that's the area where, has the summing up ever been, it's been transcribed as part of the transcript of the trial I take it has it?

SOLICITOR-GENERAL:

As I understand it, yes Sir.

TIPPING J:

But nothing's been built out of that subsequently?

SOLICITOR-GENERAL:

That is correct Sir.

TIPPING J:

Thank you. That's really what I was trying to get at.

SOLICITOR-GENERAL:

It's the Crown's case Your Honours that the Court of Appeal didn't deprive the appellant of the right to appeal according to law, when it dismissed the appellant's appeal and it is the Crown's case that the appellant was afforded every reasonable opportunity to prosecute his appeal, but he did not do so and that the appeal was dismissed, only after the appellant failed, on multiple occasions to comply with rule 27 of the Court of Appeal (Criminal) Rules.

ELIAS CJ:

Where do we find that, do we have that here?

SOLICITOR-GENERAL:

Yes, indeed. There are four bundles of authorities, Your Honour, and there is one called the primary bundle of authorities, which contains the main documents, the authorities which the Crown relies upon.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

And if you go to –

ELIAS CJ:

13.

SOLICITOR-GENERAL:

– tab 13, Your Honour, you'll see that rule 27, which is quite pivotal in this case, requires an appellant to provide full written submissions on the appeal and stipulates the time for doing so. So, there was a failure on multiple occasions to comply with rule 27. Then there was a failure to comply with orders requiring the appellant to perform his obligations under

the Court of Appeal's rules and that order was made, in my submission, under rule 43 of the Criminal Appeal Rules. And, having failed to comply with those orders – and I will take the Court to those specific orders later in my submissions, he then failed to satisfy the Court that his further participation in the appeal was permissible under rule 44. And it is my submission that ultimately the appellant's appeal was dismissed under section 385(1) of the Crimes Act, because he failed to discharge the onus that that section places upon an appellant to establish to the satisfaction of the Court of Appeal that one of the four grounds for allowing an appeal has been made out. Section 385 is under tab 12. It's a provision which Your Honours of course are enormously familiar with, and it makes it clear that the onus is on the appellant and that the failure to satisfy any one of the grounds A through to D must result in the appeal being dismissed.

ELIAS CJ:

Which provision are you referring to?

SOLICITOR-GENERAL:

385 Ma'am.

ELIAS CJ:

Yes, but in saying that it makes it clear that the onus is on the appellant. I mean, I've understood that to be the case, but I don't think I've had to consider it quite in this way.

SOLICITOR-GENERAL:

The word "onus" is not referred to specifically in the section –

ELIAS CJ:

Well, is there anything in the section that you're relying on?

SOLICITOR-GENERAL:

Yes, "And in any other case shall dismiss the appeal."

TIPPING J:

And you say it's implicit that the appellant must lead the Court to the opinion?

SOLICITOR-GENERAL:

Absolutely, yes.

ELIAS CJ:

Well…

McGRATH J:

This is all premised on the basis of there being a valid appeal determination in terms of subsection (1AA), is it not?

SOLICITOR-GENERAL:

It is, and I do propose to elaborate on this, because there are nuances and strains to this argument which I do wish to explore further. I'm merely making an introductory statement at this moment, Your Honours.

ELIAS CJ:

All right, thank you.

SOLICITOR-GENERAL:

There are four parts to the Crown's submissions. Part 1 examines the nature of the right of appeal prescribed by section 25(h), part 2 examines how that right is given effect to in New Zealand, and it is at that part of my submissions that I want to go through the effect of the Criminal Appeal Rules and, in particular, section 385. Part 3 examines what happened in this case, and then part 4 explains, by way of conclusion, why section 25(h) was not breached in this particular case.

The Crown's submissions, I hope, leave the Court with no doubt that the right contained in section 25(h) is a right of opportunity to pursue an appeal, governed by a fair procedure. Conditions imposed according to law upon the exercise of the right to appeal are consistent with section 25(h), so long as they do not amount to a denial of the opportunity to pursue an appeal. And that interpretation is entirely consistent with the approach taken in comparable jurisdictions. Moreover Your Honours, conditions –

ELIAS CJ:

Sorry, can you just tell me where we find 25(h) in this?

SOLICITOR-GENERAL:

Yes, it's –

ELIAS CJ:

I just wanted to think about it in terms of that submission.

SOLICITOR-GENERAL:

It's under tab 1 of the primary authorities, Your Honour.

ELIAS CJ:

Yes, thank you.

SOLICITOR-GENERAL:

I was making the –

ELIAS CJ:

And does that follow exactly ICCPR?

SOLICITOR-GENERAL:

My submission is that the effect is the same, there is –

ELIAS CJ:

It's the right of –

SOLICITOR-GENERAL:

– some slight subtle differences in wording.

ELIAS CJ:

Isn't there a right of review under the ICCPR?

SOLICITOR-GENERAL:

The word "review" is used in the ICCPR, and the word "review" is also actually used in the Victoria Bill of Rights Act and the ACT Bill of Rights Act.

ELIAS CJ:

Which article is it again? Sorry, I should have looked at this before coming in.

BLANCHARD J:

14(5).

ELIAS CJ:

14(5), thank you.

SOLICITOR-GENERAL:

It's 14(5).

ELIAS CJ:

"Right to it being reviewed," it's…

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Just thinking about the submission that you're making, that it's for the appellant to constitute the appeal and discharge the onus. This could – I know that there's a lot of authority on this, but it's capable of an obligation to have a second look.

SOLICITOR-GENERAL:

Yes. My submission on that is this, Your Honour: that the word "review" is consistent with some of the procedures that exist in some civil jurisdiction –

ELIAS CJ:

Oh, yes, I understand that, yes.

SOLICITOR-GENERAL:

– whereas the "appeal right", as it's expressed in section 25(h), is very consistent with the common law context, in which the right to appeal is developed, where the onus is on the appellant to advance the reasons why –

ELIAS CJ:

Yes, but the –

SOLICITOR-GENERAL:

– and the conviction should be set aside. I'm sorry Your Honour.

ELIAS CJ:

The obligation we've taken on, which section 25(h) implements, arguably is an obligation for the state to provide a second look. I wonder whether it is quite as appellant-driven as you're suggesting?

SOLICITOR-GENERAL:

Well, every single jurisdiction –

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

– has concluded that the right is one of an opportunity for an appellant to take advantage of, if the appellant so wishes, and I'm not aware of any single jurisdiction where it has been said that there is some form of duty or obligation on the part of either the judiciary or the state to in some way initiate a review of a conviction.

ELIAS CJ:

Yes, which is not quite the same thing as saying that if the right is invoked it doesn't have to be carried through. But again, that is a part of the submissions you develop.

SOLICITOR-GENERAL:

Indeed, and 14(5) is not framed as a duty at all, it is simply –

TIPPING J:

Can the point be tested?

ELIAS CJ:

Yes, I understand that, yes.

TIPPING J:

Can the point be tested by asking the question – and I ask it only rhetorically at this stage – whether the right in section 25 of the Bill of Rights is a right to a hearing?

SOLICITOR-GENERAL:

No, it –

TIPPING J:

I would have thought your argument is – and I'm not taking sides at this stage – that it's not an absolute right to a hearing, it's a right to a hearing, provided you've fulfilled the requirements of the, procedural requirements, so long as they are not an effective denial of the right.

SOLICITOR-GENERAL:

That's the Crown's position absolutely, Sir, yes. It's what the state must do is provide a fair and reasonable opportunity for an appellant to be able to pursue an appeal, and that there can be constraints placed upon that but they must be reasonable and not undermine the essence of the appeal right itself. And that's, in one sentence or two, exactly where all of the international jurisprudence leads, and I can very, very quickly summarise that, we've gone to some trouble to set it out in the written submissions –

ELIAS CJ:

They're an excellent resource, are the submissions Mr Solicitor.

SOLICITOR-GENERAL:

Well, Mr Marshall and Mr Curran deserve all the credit for that Your Honours. And Your Honours, having read that material, will appreciate that the jurisdictions actually fall into three categories. There are those where the equivalent of section 25(h) is expressed in qualified terms. That is to say, according to law and Hong Kong is an example of that and the Hong Kong Court of Appeal has said that the qualification, according to law, permits conditions to be placed on the exercise of the appeal right, provided such conditions don't hinder access to the appellant process in any material way.

And the European countries have the same qualification according to law and their conclusions are exactly the same. That it's a right of opportunity and that the conditions can be placed, so long as those conditions do not undermine the essence of the right of appeal.

South Africa and the 11 states in the United States which we found that had appeal provisions in their constitutions, expressed their right of appeal in unqualified terms. So the words, according to law, or equivalent language, is not found in the South African constitution, or in the 11 states of the United States, which provide for a right of appeal in their respective state constitutions.

But most interestingly, in both South Africa and in the states of the United States, where we've been able to find cases that have considered these provisions, the Courts have actually imposed conditions, saying that even though the language might be unconditional, the right to an appeal is, and I quote from the Constitutional Court of South Africa, "The opportunity to have one's conviction and sentence adequately reappraised and that this requires a reasonable procedure that is appropriate and fair and that appeals must be prosecuted with due diligence and that grounds for appeal must be advanced," and we've cited authorities which show that appeals have been dismissed for failure to comply with those requirements.

And in the United States, the states of Washington and Utah are the only states where we've found where there this provision has been considered. Again, restraints have been placed upon the right to an appeal and what the American Courts have done is construct a deemed waiver provision, because they don't have the qualifying words, according to law. So they have constructed a deemed waiver and in my respective submission, we certainly don't need to go down that route at all. But the end result is exactly the same. Because of a failure by the appellant to comply with the, according to law qualifications to the right of an appeal, an appeal can be dismissed, or an appellant may be deemed to have had their right to an appeal

waived, because of their failure to comply with Court timetable provisions and requirements for filing grounds for an appeal.

So that Your Honours explains the international jurisprudence in a nutshell and I'm very, very happy to delve further into any of the countries that we've been able to examine if you wish.

ELIAS CJ:

I'd be assisted by being taken to cases which deal with the provision, not of points of appeal and those sorts of rudimentary threshold requirements, but written submissions.

SOLICITOR-GENERAL:

Yes, there are two that I think I can take you Your Honour to. One is the judgment of the Court of Appeal of Manitoba in *R v Seman* MBCA AR 94-30-02026, 7 February 1996.

ELIAS CJ:

Oh yes.

SOLICITOR-GENERAL:

And that I think is in tab, under tab, it's in volume 3, tab 64, in paragraph 12. So that's volume 3, tab 64. Your Honours will appreciate that it's actually difficult to find cases which consider these issues in considerable depth, because most of them are dealt with quite summarily with frequently no reasons at all actually advanced in writing. But this is one and the other is the South African case of *S v Mohlathe* 2000 (2) SACR 530 (SCA) which can be found under volume 2, under tab 47.

ELIAS CJ:

Sorry, what, were there any paragraphs –

SOLICITOR-GENERAL:

Oh, in *Seman* it's 12, paragraph 12. In this particular case, the application to appeal against conviction was struck out because of the failure to advance written submissions, in accordance with Court timetables and directions.

ELIAS CJ:

Yes, and the, sorry, the South African one?

SOLICITOR-GENERAL:

Was a case called *Mohlathe* M-O-H- –

ELIAS CJ:

Sorry, where is it?

SOLICITOR-GENERAL:

– L-A-T-H-E. It's in volume 2, under tab 47.

ELIAS CJ:

Okay.

SOLICITOR-GENERAL:

And if my notes are correct, it's at paragraph 31.

BLANCHARD J:

Sorry, which paragraph number?

SOLICITOR-GENERAL:

It's actually, at paragraph 31(b) Your Honour.

ELIAS CJ:

It's a condonation.

SOLICITOR-GENERAL:

It's an appeal from a dismissal of a condonation. The South African process, as I understand it Your Honour, is if you have breached the Court rules, you must get –

ELIAS CJ:

Approval.

SOLICITOR-GENERAL:

– leave of the Court, by way of an application of condonation.

ELIAS CJ:

And they gave it?

SOLICITOR-GENERAL:

That they denied it.

ELIAS CJ:

Oh, they denied it, I see.

SOLICITOR-GENERAL:

Denied it and then there was an appeal from that.

ELIAS CJ:

Oh, the appeal against the refusal –

SOLICITOR-GENERAL:

That's right.

ELIAS CJ:

– is upheld?

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

In condonation –

TIPPING J:

I think it's the other way round.

ELIAS CJ:

Yes, I think they've upheld the appeal and condonation is granted, so the Appellate Court has granted condonation.

TIPPING J:

But the implication is that the Court below was entitled, but on this occasion got it wrong. It's not suggested it had no power to. Is that that in this particular case, I agree with what the Chief Justice has –

SOLICITOR-GENERAL:

Yes, I'm sorry Your Honours, yes, yes.

TIPPING J:

There's no suggestion here that the original order of the order from the Court, *a quo* as they put it, was without jurisdiction or in breach of rights or something, they just substituted their own view?

SOLICITOR-GENERAL:

Yes, that is correct Sir. I'm sorry I –

ELIAS CJ:

These are, I mean, presumably the Crown has done quite a substantial search, as we can tell from the comprehensive submissions. These are quite lightweight authorities for the key point here.

SOLICITOR-GENERAL:

I accept that without hesitation, if I could have found more –

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

– detailed reasoning, then you can be sure it would be before you. But, nevertheless, the international jurisprudence is one in saying that the right to an appeal is a qualified right.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

That reasonable conditions can be placed upon the way in which an appellant accesses that right to an appeal and that failure to comply with those reasonable conditions can justify the dismissal of an appeal.

ELIAS CJ:

Yes. One can get to the first step quite readily I think. It's really how far that allows you to go. We do have a legislative provision here, because the rules do have legislative source and we don't have a direct challenge to the reasonableness of the requirement, although, again, I would have thought that this Court needs to be very careful in this area and that collateral challenge might well have to be entertained in an appropriate case.

SOLICITOR-GENERAL:

Yes. Well, Your Honour what I was proposing now is to come on to part 2 of my submissions, which deals in a lot more depth with the New Zealand position and I particularly wanted –

ELIAS CJ:

Right.

SOLICITOR-GENERAL:

– and I particularly wanted to go through the rules. I also want to examine aspects of the Court of Appeal's inherent jurisdiction, because I think that that is actually a relevant consideration.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

And I also want to examine section 385 in a little more depth than I did in my introductory comments.

ELIAS CJ:

Yes. Just before you do that, in terms of the international material, do the rules in the jurisdictions that you have principally mentioned, do they contain anything equivalent to rule 27?

SOLICITOR-GENERAL:

Yes, indeed Your Honour.

ELIAS CJ:

They do?

SOLICITOR-GENERAL:

Yes. Time limits for filing written submissions seem to be quite standard –

ELIAS CJ:

Quite.

SOLICITOR-GENERAL:

– in Canada, the United States –

ELIAS CJ:

Which part of your submissions is that referred to in?

SOLICITOR-GENERAL:

Sorry, Your Honour, –

ELIAS CJ:

They're not.

SOLICITOR-GENERAL:

– it's not specifically referred to. But certainly our reading of the Canadian cases, the American cases, the South African cases and the European cases, have all, where this issue has arisen, made reference to rules of Court which stipulate the time for filing written submissions. In some instances they're referred to as "factums" and in some places they're have other different descriptions but the essence of it is, full written submissions advancing the grounds of appeal, and –

ELIAS CJ:

And you're going to take us on to show us how the framework of the New Zealand provisions leads you to the Court having authority to treat the appeal in the way it did here.

SOLICITOR-GENERAL:

Indeed Your Honour, and that's the next phase in my submissions –

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

– if that's of assistance to the Court. To deal with that, Your Honour, I've actually asked for a flow chart to be prepared, and I wonder, Madam Registrar, if you could make that available to the Court? It's just a one-page document.

Your Honours, in New Zealand the right to appeal is regulated by the lawful conditions set out in the Crimes Act 1961 and in the Court of Appeal (Criminal) Rules of 2001. And it is the Crown submission that under section 385 an appeal must be dismissed if one of the four grounds for allowing an appeal, set out in section 385, is not established. It is also the Crown's position that an appeal can be dismissed on what I will simply refer to as "procedural grounds" without infringing section 25(h), if the appellant fails to comply with the Court rules and orders relating to the conduct of an appeal.

Now, as we've seen, rule 27(2) and (3) require an appellant to file written submissions on their appeal no less than 15 working days before the hearing date. And the filing of submissions on the merits of an appeal is a perfectly reasonable requirement. The purpose of written submissions is to inform the Court and the respondent of the reasons why, in the appellant's view, the appeal should be allowed. And the provision of written submissions assists in the orderly conduct of oral criminal appeal hearings and avoids unnecessary delays that might occur if neither the Court nor the respondent are aware of what the appellant's contentions are before the hearing. And, as we've seen, by reference to the *Seman* case and

the *Mohlathe*, Courts in South Africa and Canada have dismissed appeals for their failure to comply, because of an appellant's failure to comply with written submissions.

Now, failure by an appellant to comply with rule 27 can result in the Court invoking rule 43, which is the next step, logically, in my submission. And rule 43 empowers the Court to order an appellant to comply with the Court's rules, so it becomes an order of the Court, and I'll go on later in my submissions, when I deal with exactly what happened in this case, to explain how that rule became utilised in the present case. If an appellant fails to comply with an order made under rule 43, then the appellant would not be able to participate further in the appeal unless rule 44 operates, to preserve that participation.

ANDERSON J:
Do you accept, perhaps, that rule 44 at least requires the Appellate Court to give some consideration to the issue of wilfulness?

ELIAS CJ:
Of?

ANDERSON J:
Wilfulness.

SOLICITOR-GENERAL:
Wilfulness.

ANDERSON J:
Because I don't see any consideration of that in the judgment dismissing the appeals.

SOLICITOR-GENERAL:
Well, I'll come on to say how I believe the Court, whilst not making reference to rules 43 or 44, or indeed 27, actually mimic the effect of these rules Your Honour.

ELIAS CJ:
Mimicked the effect?

SOLICITOR-GENERAL:
Yes, gave effect to.

ELIAS CJ:
Yes.

SOLICITOR-GENERAL:

Now, I just want to pause at this point because, aside from rules 43 and 44, the Court also has an inherent power to prevent an abuse of its processes, and the inherent power could also be invoked to prevent a non-compliant appellant from participating further in the appeal. Now, the effect of either approach, either going and relying upon rules 43, 44, or by relying upon the Court's inherent jurisdiction, is that the appellant who fails repeatedly to comply with the Court's rules and orders is ultimately effectively barred from participating in the appeal.

ELIAS CJ:

I'm just thinking about – are you going to enlarge on the inherent jurisdiction here?

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Because given the regime set up by the rules, there would have to be some aspect of gaming the system or something that was an abuse of the system, rather than simply non-compliance, to push the Court into invoking inherent jurisdiction, would it not?

SOLICITOR-GENERAL:

No Your Honour, and the best authority I can rely upon for that would be Your Honour's own judgment in *R v Smith* [2003] 3 NZLR 617 (CA), where of course Your Honour identified the inherent jurisdiction of the Court as being broadly based to ensure that justice is done and to avoid an abuse of process.

ELIAS CJ:

But that was because there was no statutory framework –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

– that could be invoked, that's why.

SOLICITOR-GENERAL:

Yes. But I would, in my respectful submission, and I can go on to elaborate on abuse of process. An abuse of process involves more than just wilfulness. It does not need to involve wilfulness. A failure to comply and engage can constitute an abuse of the Court's processes.

TIPPING J:

But, Mr Solicitor, insofar as anything is not expressly covered by the rule, rule 45 seems to be a gap filling, the traditional gap filling measure, and that talks about, "Best calculated to carry out the purposes of part 13 of the Crimes Act," then it strangely says, "or the other relevant Act." Does it mean, "any other relevant Act," which presumably would then be the Bill of Rights? I think it must mean "any", mustn't it?

SOLICITOR-GENERAL:

It must mean "any", Your Honour, –

TIPPING J:

So it's just a drafting slip.

SOLICITOR-GENERAL:

– because there are so many other cases that can result from criminal appeals.

TIPPING J:

But, leaving that little curiosity aside; wouldn't that be where one would go for the so-called inherent, that is Parliament's command, if you like, that if anything crops up that's not directly covered by the rules, this is how you shall go about it?

ELIAS CJ:

Well, it's an Order in Council, isn't it?

SOLICITOR-GENERAL:

Well, that's the Executive's –

TIPPING J:

Well, sorry, did I say "Parliament"?

SOLICITOR-GENERAL:

Yes.

TIPPING J:

Well, I mean, whoever it is.

SOLICITOR-GENERAL:

Yes, the Executive's requirements. Yes, Your Honour, I hadn't placed as much reliance on 45 as perhaps I could have, because I just really went to the inherent jurisdiction.

TIPPING J:

Well, I'm just saying that when one's talking about the inherent powers of the Court of Appeal in this context, I would have thought, with respect, that it would be unlikely that you'd need to go beyond rule 45.

SOLICITOR-GENERAL:

Right, yes, well that is certainly an option that's available Your Honour.

TIPPING J:

Which is not really an inherent power and it's an express power albeit to be exercised as stipulated.

ELIAS CJ:

And Bill of Rights Act compliant.

SOLICITOR-GENERAL:

Indeed.

TIPPING J:

Indeed.

SOLICITOR-GENERAL:

I accept that proposition Your Honour. I might be creating an unnecessary rod for my back when I rely solely on inherent jurisdiction.

TIPPING J:

I think one's prickles tend to go up and down one's spine when one talks about inherent, particularly when you don't really need it.

ELIAS CJ:

And particularly in the context of access to justice.

SOLICITOR-GENERAL:

Yes, now ultimately, the appeal gets dismissed and it is, in my respectful submission, a dismissal under section 385.

TIPPING J:

Because there's been the opportunity, which had not been availed of and therefore, you get to the point do you, in your argument that there comes a time when, provided the person has

had a reasonable opportunity in accordance with the law, it can be validly said they haven't established a ground.

SOLICITOR-GENERAL:
Correct.

TIPPING J:
That's the line of thought.

SOLICITOR-GENERAL:
That's it and I won't go any further because Your Honour has articulated exactly what I was going to be saying.

TIPPING J:
I'm sorry. I didn't mean to anticipate you.

SOLICITOR-GENERAL:
You've anticipated very well, Sir. That's it in a nutshell. There is just one other little element that I'll throw in for consideration. Section 399 of the Crimes Act, under tab 12, 399(4) contemplates that an appeal has been deemed to be dismissed pursuant to rules of Court.

TIPPING J:
That's a rule 10 sort of situation is it – that's in the civil arena of course, but it would be equated where if you don't do something by a certain date, you're deemed to be dismissed. But there's nothing like that in the criminal rules is there?

ELIAS CJ:
There may be if you don't –

SOLICITOR-GENERAL:
Well this is what – this is the Crimes Act and this is the nearest we can get to it.

ELIAS CJ:
One that does not carry through into the rules.

SOLICITOR-GENERAL:
No.

ELIAS CJ:

Then it goes nowhere.

SOLICITOR-GENERAL:

Which is why I think that it's more comfortable that the dismissal occurs under section 385(1) because of the failure of an appellant to get the Court over the hurdle in relation to one of the four grounds for an appeal.

BLANCHARD J:

Have you looked back to see whether in 1961 there were rules which had a dead end provision in them.

ELIAS CJ:

They may well have, yes.

SOLICITOR-GENERAL:

I have to apologise Sir, no I didn't go back to 1961.

BLANCHARD J:

That may be the explanation of those words. In other words, there's a power there but at the moment it's not being used.

SOLICITOR-GENERAL:

And this Court has that power under rule 38(4) of the Supreme Court Rules, where there's been a failure to comply with the Court's timetables in a criminal case, then the Court has the express power to dismiss the appeal.

ELIAS CJ:

Yes, I'm just thinking about – there is no automatic dismissal. So it's the Court determination that it should be dismissed for procedural reasons that is issue here.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

So a lot of the submissions directed at – it is an available procedure, particularly in other jurisdictions for the Court to do it. You will come on to say why it was reasonable in this case.

SOLICITOR-GENERAL:

In the circumstances.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Indeed, that's going to be part 3 of my submissions. I wanted to lay the framework as it exists in New Zealand before the Court and that was the purpose of the flowchart, just to see where I'm going to go.

ELIAS CJ:

Yes, and I'm just wondering whether it is, I suppose it's right to say that it gets dismissed under 385 but that really, although that really does envisage a merits determination. I wonder whether it isn't rather that the appeal doesn't go near. I'd like you just to explain why it is under section 385, why it isn't simply pursuant to the Court's powers under the rules that this appeal is dismissed?

SOLICITOR-GENERAL:

And that is one alternative that would be available to this Court to decide. Now if I can be perfectly frank and candid Your Honours, the debates which have gone in within Crown Law as to which is more preferable have been quite exhausting this week.

ELIAS CJ:

What would happen is, I think, is that if it was dismissed under, procedurally as indeed the Court of Appeal uses that language, if it is dismissed procedurally the outcome would be that the appellate Court wouldn't be looking at section 385 in terms of the remedy. It might not get into, for example, the application of the proviso.

SOLICITOR-GENERAL:

Yes, correct.

ELIAS CJ:

It would simply be a send-back relief.

SOLICITOR-GENERAL:

I'm sorry Your Honour, I'm not following that very last point.

ELIAS CJ:

Well if the appeal has been dismissed by the Court of Appeal procedurally as they purported to say, procedurally, then I suppose the consequence is that the appeal has not been heard and that any remedy given by this Court would not be under section 385, and would not entail, for example, consideration of application of the proviso.

SOLICITOR-GENERAL:
I understand Your Honour now.

ELIAS CJ:
It would be a –

SOLICITOR-GENERAL:
I now fully understand what Your Honour is saying.

ELIAS CJ:
I don't know whether that's right. I'm just trying to tease it out.

SOLICITOR-GENERAL:
Yes, and to the extent that I can assist you I will, and it is, I think, fair to say that there are two routes available. One is for there to be a dismissal for non-compliance with rule 43, particularly when it is expressed as a last chance order. "You shall do this by such and such a date and if you fail to do so then your appeal will be dismissed and unless order." But I do cling to the proposition that section 385 actually perhaps does nevertheless provide the cleanest method of disposing of an appeal for the exact reasons that His Honour, Tipping J, articulated, namely, the appeal must be dismissed by, under the –

TIPPING J:
I have to confess I didn't have this particular aspect in mind when I said that Mr Solicitor. I was just thinking down that line without comparing it with other lines.

SOLICITOR-GENERAL:
Yes, and the reason for me advancing the 385 method of dismissal is because it does create a presumption that the appeal will be dismissed unless the Court is taken over the thresholds of allowing the appeal under one of the four stipulated grounds in section 385(1).

TIPPING J:
But the most immediately obvious reference to it is in rule 44 isn't it?

SOLICITOR-GENERAL:
Yes.

TIPPING J:

That seems to be the most natural place where you would say, well, I'm sorry, you're not going to be allowed to continue to take part in the appeal.

SOLICITOR-GENERAL:

Yes, but then what's happened, if I can speak rhetorically, the question then is, well what's happened to the appeal at that point?

TIPPING J:

Well, consequentially it must be dismissed.

SOLICITOR-GENERAL:

And I would say pursuant to 385.

TIPPING J:

And using rule 45 in aid if necessary.

SOLICITOR-GENERAL:

That's definitely one option Your Honour. I would have advanced the proposition that you can rely on 385, but certainly 45 is available as an option.

McGRATH J:

But it might leave some room that the Court of Appeal itself has to explore, concerning the merits of the appeal under section 385(1).

SOLICITOR-GENERAL:

Yes, although I would advance the submission Your Honour that if this is a procedural dismissal of an appeal, and can I just take a hypothetical example? A notice of appeal is filed and nothing is heard from anybody for two or three years, and it comes back before the Court and the Court dismisses it. There were no arguments about merits whatsoever. There was just no information about merits at all before the Court.

BLANCHARD J:

But in that situation the Court could comply with the requirements of section 385 if there is a requirement, by saying nothing has been put forward to support the appeal, therefore there is no appearance of any merit in the appeal and it is accordingly dismissed under section 385. I suppose the real question is whether there can be an entirely procedural dismissal or whether the Court is, notwithstanding the deficiencies of the appellant's performance, obliged at the

end of the day to say, right, well, on the material before us, is section 385 met, and make a determination.

SOLICITOR-GENERAL:

Yes, in my submission to Your Honours is to make two points. In the present case, as I will go on to explain, the Court effectively did make a decision.

BLANCHARD J:

I understand that submission.

SOLICITOR-GENERAL:

But will also advance the submission, it didn't need to.

TIPPING J:

I wonder about that last proposition Mr Solicitor.

ELIAS CJ:

Yes.

TIPPING J:

That's where I think things start to get tricky. As my brother Blanchard has said, if you've something, but not enough or not compliance with the rules, might it not be thought that you have an obligation to at least consider the something.

SOLICITOR-GENERAL:

Whatever it is.

TIPPING J:

Whatever it is. It may be a screed of rubbish in the notices of appeal.

BLANCHARD J:

And there's no power to do it on the papers.

SOLICITOR-GENERAL:

Correct.

TIPPING J:

And on the other hand, it may be not a screed of rubbish in the notice of appeal. It may have something that at least, conscientiously on its face, you think, oh, I'd better have a look into this.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

And the appellant is completely hopeless. I would just be a little anxious about saying you don't have to.

SOLICITOR-GENERAL:

And can I express it in a way which I hope will not add to the confusion because I'm very, very hesitant to engage in the language of merits appeals, and this particular case, and the reasons for that will be very obvious to the Court. But I would not want the Court to be seduced into a position where too much reliance was being placed upon merits considerations.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

And if I can go back to the proposition, the scenario I put before, where there is a notice of appeal and nothing more.

TIPPING J:

Then there wouldn't be anything ex facie that there was any conscientious obligation to consider.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

But say there is.

SOLICITOR-GENERAL:

But isn't, at that point, if I take His Honour, Blanchard J's analysis, presumably it's open to the Court to say, "We have to be satisfied on merits. There is nothing here that permits us to be satisfied on merits, therefore it's dismissed."

TIPPING J:

Absolutely, but I'm talking about the case where there is something that at least conscientiously, triggers you to think, well I'd better have a look at that, and then you surely

must conscientiously consider it and then you can dismiss under 385. It wouldn't be a fully procedural dismissal then.

SOLICITOR-GENERAL:

Well, I think we are in agreement that in this particular case there was that additional step taken.

TIPPING J:

Oh, yes, I'm talking generally. I'm talking generally.

ELIAS CJ:

Mr Solicitor, don't we have to be extremely careful about making assumptions of partial information before the Court, because there are natural justice issues here. If one looks at the whole rationale behind natural justice, that there are open and shut cases that weren't and so on, the Court may well say, "Ah, gotcha." We've got a bit of stuff on the merits here and it's a load of rubbish and we'll deal with it. Really what you've got here is a case that was not properly constituted to enable a determination to be made of the merits of the points raised in the notice of appeal.

SOLICITOR-GENERAL:

Well, the point that I would depart from Your Honour on is this. In this particular case, as I will elaborate when I get into the details of the case, every reasonable opportunity was afforded to the appellant, –

ELIAS CJ:

Yes, I understand.

SOLICITOR-GENERAL:

– and the right under 25(h) is a right of opportunity.

ELIAS CJ:

Yes.

ANDERSON J:

To not only intelligent and competent people, but also to people who may be emotionally disturbed, incapable of presenting their appeal.

ELIAS CJ:

Or writing.

SOLICITOR-GENERAL:

But it's a right of opportunity, –

ELIAS CJ:

Well –

SOLICITOR-GENERAL:

– and the reasonableness of the way in which that right is availed –

ANDERSON J:

I'm just talking generally, but that's a right that lies with every citizen, every person in the dominion, and some people, well, most people will be reasonably competent and responsive to advice, but there are other people who are, just by nature, difficult, or have great difficulties in dealing with things –

SOLICITOR-GENERAL:

Yes.

ANDERSON J:

– and they may be deprived of an opportunity for the state to consider their appeal, in circumstances where the state, where the Courts might have a duty to pursue it themselves.

SOLICITOR-GENERAL:

With respect, I think you've gone too far with the last proposition Your Honour. The duty on the state is to provide the mechanism, the opportunity, for an appellant to be able to take advantage of the right to pursue an appeal. Now, the safeguards, and I would respectfully submit the New Zealand system has really very, very good safeguards, the safeguards are these. There's not going to be a dismissal of an appeal simply because somebody has failed by one day to file written submissions under rule 27. Before you get to the dismissal stage, there's going to have to have probably been specific orders under rule 43. The presumptions against participation under rule 44 are going to be alive and need to be very, very carefully considered, and then ultimately a dismissal will only occur if the Court is being very, very, conscientiously satisfied that every reasonable opportunity has been afforded to this particular appellant to be able to pursue their appeal. And considerations of the kind that Your Honour has raised earlier about the capacity of an individual are considerations which will be legitimately explored and taken into account at the rule 43, 44 stage before we get to strike out.

ANDERSON J:

Particularly when you get this reference in rule 44 to being satisfied that it wasn't wilful.

SOLICITOR-GENERAL:
Yes.

TIPPING J:
Well, say someone couldn't write, as the Chief Justice has hypothesised, presumably they would make that known to the Court and then some accommodation could be made for that under rule 44.

SOLICITOR-GENERAL:
Absolutely.

McGRATH J:
Mr Solicitor, isn't it the case, when you suggest there are two routes, the rule 44 route and the section 385 route, that rule 44's expressed in carefully, I would suggest, in terms that do not extinguish the appeal –

SOLICITOR-GENERAL:
Correct.

McGRATH J:
– and leaves the appeal extant with the statutory responsibility on the Court of Appeal to decide it, even though there may be restrictions on participation by the appellant.

SOLICITOR-GENERAL:
Yes.

McGRATH J:
So, really, is there a rule 44 route that's arguably a rule 44 route at all?

SOLICITOR-GENERAL:
Well, which is the very reason why I say the final step, the striking out, is a section 385, is pursuant to section 385, the final step, that's why I've advanced that particular argument. But I do see some strength in the argument that the Court could make an "unless order" under section 43, for example.

BLANCHARD J:

Can the Court strike out under section 385? Isn't it obliged to look at the merits, do the best it can with the material it has, and then determine the case under section 385 on the merits, which is not an onerous obligation –

SOLICITOR-GENERAL:
Well –

BLANCHARD J:
– in the vast majority of these cases, where nothing has happened?

SOLICITOR-GENERAL:
Well, there is the argument, Your Honour, that the appeal could possibly be dismissed before you get to 385, because of a failure under rule 43, 44 or 45 to –

BLANCHARD J:
Well, I'm not sure about that.

SOLICITOR-GENERAL:
I acknowledge, Your Honour, that there isn't in those rules the same express provision that is found in rule 38(4) of this Court, 38(4) or…

BLANCHARD J:
And they have to be consistent with and read consistently with section 385.

SOLICITOR-GENERAL:
Yes.

ELIAS CJ:
And section 25(h) –

SOLICITOR-GENERAL:
Yes, indeed.

ELIAS CJ:
– and it would be a bit odd to have rules denying or being the dominant consideration.

TIPPING J:
What I like about 385 is the fact that it requires the Court to consider what it's got.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

Which may not be much, but it gets over the problem we were debating a few minutes ago of this sort of, oh, well, if you peremptorily do it procedurally you may not be looking at anything, where the person might have actually raised a perfectly good appeal point in his notice of appeal, in writing, –

SOLICITOR-GENERAL:

Yes.

TIPPING J:

– and the fact that he's failed to comply with all sorts of procedures and so on shouldn't, in my view, avoid the duty to at least consider that.

SOLICITOR-GENERAL:

Yes. Well, I think, if I detect the mood of the Court, Your Honours have probably got to the point where I was on Thursday.

ELIAS CJ:

On –

BLANCHARD J:

And then you went off the trail.

SOLICITOR-GENERAL:

Oh, no, no, I have to –

TIPPING J:

You were seduced into –

SOLICITOR-GENERAL:

– respect my very learned junior's forceful entreaties to me.

ELIAS CJ:

But one of the consequences of that is that the powers the Court has under the rules need to be exercised with section 385 in mind and its assumption that disposition turns on some assessment –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

– and I would have thought that the sort of things a Court, and maybe it's a contextual determination, you're going to come on to look at the facts, but I would have though that it's the assumption that it's dismissed the appeal that is the query I have, because surely there were at least three other options that the Court has. Instead of saying, "The appeal is dismissed," it could say, "Until you file written submissions, we will not entertain this appeal." Or it could say, "We're giving you notice that we're going to deal with this matter at a hearing on the materials currently before us or anything else that you want to provide at the hearing."

BLANCHARD J:

And that hearing could be on the papers.

SOLICITOR-GENERAL:

Yes, and both occurred in this case.

ELIAS CJ:

Well, except that that isn't really what the Court of Appeal said, but you're going to come to –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

– look at that. But the option, in a case where you really can't form a view of the merits from the material that's filed, and you don't have much confidence you're going to be assisted at all by the hearing, might be, "Until you file written submissions we're not going to entertain this appeal." Now, I know that that leaves an untidiness in the Court's filing system, but it –

SOLICITOR-GENERAL:

And it's not, with respect, entirely consistent with the international obligation that is, to provide an opportunity to advance an appeal, and, provided the state's provided that opportunity it's not open ended.

ELIAS CJ:

But the opportunity – but that's why I asked you about the cases about these accumulated requirements –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

– in terms of written submissions, and how they have been considered by the Courts, because you do have a constituted appeal here, –

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

– you do have notice of points to be taken on appeal.

SOLICITOR-GENERAL:

Yes, and I do want to explore those in some detail.

ELIAS CJ:

So that opportunity has been taken.

SOLICITOR-GENERAL:

Yes and the opportunity to advance those grounds of appeal have also been provided on multiple occasions.

ELIAS CJ:

But in the manner specified by the Court, I just really wonder whether it's too prescriptive, but that's something that you'll –

SOLICITOR-GENERAL:

Indeed Your Honour.

ELIAS CJ:

– take us to further, yes.

SOLICITOR-GENERAL:

And that leads into part three of the submissions, which was an examination of exactly what happened in this particular case.

BLANCHARD J:

Where in your submissions are you taking us to?

SOLICITOR-GENERAL:

Quite frankly Your Honour, I haven't looked at my submissions for some time.

BLANCHARD J:

Well, are you talking about part 3?

SOLICITOR-GENERAL:

I'm sorry, part 3 of my oral submissions today, Your Honour.

BLANCHARD J:

Oh, I see, I've been looking to and fro for these parts.

SOLICITOR-GENERAL:

You've been looking for parts 1 and 2, have you? I'm sorry.

ELIAS CJ:

Well, I understood.

SOLICITOR-GENERAL:

Part 3 of my oral submissions examines what actually happened in this particular case. And what I don't propose to do is actually go through the extension of chronology, and it's true the supplementary chronology was only made available to the appellant this morning and that was because we didn't actually find the rest of the file until last week and prepared the chronology and got it out as quickly as we could, but I'm sorry for the appellant that he only had the provisional chronology and not the full chronology until this morning.

We have set out in the submissions a quite detailed explanation as to what occurred in this particular case, and they start, I think, at paragraph 92 of the written submissions. What I think is sufficient for present purposes, is to note the following. The notice of appeal dated the 2nd of April, which is case on appeal tab 1, is a detailed notice of appeal. It identifies 10 specific ground of appeal, it actually includes references to legal terminology, which one would not normally expect from a lay person and, of importance for the way in which events unfolded, grounds numbered 2, 3 and 4 –

ELIAS CJ:

Sorry, where are these grounds earmarked?

SOLICITOR-GENERAL:

Case on appeal.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Volume 1 – tab 1, Your Honour.

ELIAS CJ:

Oh, yes, I'm sorry, I have it open.

SOLICITOR-GENERAL:

I've just realised what the time is Your Honours, I mean, as I'm just starting a new section –

ELIAS CJ:

We will –

SOLICITOR-GENERAL:

– I'm entirely in your hands as to whether you want to take the…

ELIAS CJ:

All right, we'll take the morning adjournment now, thank you.

COURT ADJOURNS: 11.27 AM

COURT RESUMES: 11.44 AM

ELIAS CJ:

Yes Mr Solicitor.

SOLICITOR-GENERAL:

Thank you. So I was about to embark on an analysis of what happened in this case, and I wanted to start off with the notice of appeal which is under tab 1 of the case on appeal, and point out to the Court that it is quite a detailed notice of appeal. It specifies 10 specific grounds of appeal and items numbered 2, 3 and 4 concern two points, which become relevant later in the chronology of events. Those two points concern the concern that the appellant had about the issue of a search warrant to obtain his cellphone records, and the second was the allegation that the entire jury pool was prejudiced by the registrar.

Now, neither of these grounds of appeal is explained in the appellant's handwritten statement of his grounds of appeal, which can be found at pages 5 and 6 of the case on appeal. You'll

see that the appellant explains in one and a half pages what his grounds of appeal are. Neither of those two points are referred to.

Now in between the filing of the notice of appeal on the 2nd of April 2008 and the hearing on the 15th of October 2009, fixtures to hear and determine the appeal in the Court of Appeal were adjourned at the appellant's request on four separate occasions, and the dates for those are set out in paragraph 7 of the Crown's submissions. In addition, the appellant failed to comply with 12 directions and letters from the Court, requiring him to file submissions in support of his appeal and the dates of those directions and reminders are set out in paragraph 8 of the Crown's submissions.

Now these directions and orders include one of the 30th of June 2009 and one on the 7th of September 2009, which I will come on to and examine in a little more depth later. But it's worth noting, before getting into the details of those directions, that the Court of Appeal pursued the issue of the appellant's representation on five separate occasions with the appellant, and the dates of those occasions are set out in paragraph 14 of the Crown's submissions.

And it's the Crown's submission that the appellant was afforded every reasonable opportunity to advance his appeal. Indeed, it can be submitted that the Court of Appeal was over-indulgent when the Court granted the appellant several adjournments and warned him repeatedly of the need to him to comply with the lawful requirements to prosecute his appeal.

The Court's minute of the 30th of June which can be found in the case on appeal under tab 48 is worth consideration. The Court notes at paragraph 5 –

TIPPING J:
Sorry, could you just pause? What tab was it in what volume?

SOLICITOR-GENERAL:
It's case on appeal Your Honour and it's under tab 48.

TIPPING J:
48, thank you.

SOLICITOR-GENERAL:
The Court commences by recording the fact that this matter had been outstanding for some time, and refers to minutes of the Court indicating how the matter was to progress matters.

And at paragraph 4A is a requirement for the appellant to file written submissions in support of his appeal, "If he does not file such written submissions then he will not be heard at the appeal." This is an unless order.

Now although rule 43 is not specifically referred to in the minute that I would respectfully submit, is a faithful adherence to the requirements of rule 43, and recognises under rule 44, quite clearly that – I'm sorry I won't infer further.

Can I then take the Court to paragraph 5? Because of the delay which has occurred in this matter –

BLANCHARD J:

Well can we just pause at 48? Was it appropriate for the Court to say, "If he does not file such written submissions then he will not be heard at the appeal?" How can the Court determine in advance of the non-compliance whether it's not wilful, or is wilful?

SOLICITOR-GENERAL:

Well whether it was anticipating or not Your Honour, the reality is that it did in fact provide further opportunity.

BLANCHARD J:

I appreciate it did but it just seems to me that the Court exceeded its powers perhaps.

SOLICITOR-GENERAL:

Well, you've got – Your Honour has to appreciate that this, I think was the third –

BLANCHARD J:

I appreciate the Court had every reason to be a bit grizzly but it's a question of whether its rules actually enabled it to say what it did there.

SOLICITOR-GENERAL:

Well, there is an issue as to whether or not rule 44 requires wilfulness per se, and whether or not it would be possible for the deficiency to be weighed or remedied otherwise.

McGRATH J:

Do you say that the power of the Court to make an order in those terms, that he won't be heard, derives from rule 43, enforcement.

SOLICITOR-GENERAL:

Yes.

McGRATH J:

Because it's certainly not expressly in rule 44 is it?

SOLICITOR-GENERAL:

Correct, that's why I said it was – I said that this order reflected rule 43.

McGRATH J:

It's quite a - reading rule 43 quite widely to say that there will be a hearing of the appeal at which a Court orders an appellant is not heard. That sort of power is quite a wide reading, I suggest, of a general enforcement power, to say that the appellant can't be heard at the appeal.

SOLICITOR-GENERAL:

Well, with respect, no, not given the chronology of events, and I know I don't need to elaborate on those.

McGRATH J:

The circumstances are underlying, we're talking about jurisdiction now.

SOLICITOR-GENERAL:

Yes, yes, yes, but the jurisdiction is an order of the Court. You fail to comply with an order of the Court, it is quite appropriate for the Court to explain what the consequences of your failure will be.

ELIAS CJ:

It's starting really to say that there will be hearing at which a party will not be heard.

SOLICITOR-GENERAL:

Unless there are very, very sound reasons advanced as to why.

ELIAS CJ:

It's really a question of focus, isn't it, and whether the Court was really thinking what it was doing here and what was the appropriate response?

SOLICITOR-GENERAL:

Well rule 44 will permit further participation of course. It's really bringing to the appellant's attention that he is reaching the end of the road. So we had the Court, and then I wanted to

specifically point out paragraph 5 of the Court's minute of the 30th of June, where the Court recognises that its duty was to provide the appellant with every opportunity to address the matters which he says he needs to have dealt with by the Court. And they were setting the hearing down some considerable time out so as to avoid any further suggestions that the appellant had been denied an opportunity to advance before the Court the matters which he wanted to have dealt with in the Court.

Notwithstanding, the Court said that this is his last chance and that this was an unless order. The Court provided him with further indulgence because the case was set down for hearing on the 30th of September – I'm sorry, because as at the 30th of September when the Court realised that there had been a failure to provide written submissions, Her Honour, Justice Glazebrook, provided a further opportunity for the appellant to file written submissions, which it was understood would be happening that day.

ELIAS CJ:

Sorry what are we looking at?

SOLICITOR-GENERAL:

Tab 60. The Court had required the appellant, yet again, to file written submissions. It was set down for hearing on the 15th of October. On the 7th of September, when it was apparent that he had failed to comply with the requirement that he file submissions, the Court again provided him with further opportunity to file written submissions.

TIPPING J:

He was out of time by this stage was he so this was a further –

SOLICITOR-GENERAL:

Yes.

BLANCHARD J:

But quite clearly, from paragraph 4 of that minute, the Court isn't proceeding with the threatened refusal to hear from him.

SOLICITOR-GENERAL:

Correct.

BLANCHARD J:

Because it's saying he's made a number of applications. These can be dealt with at the hearing.

SOLICITOR-GENERAL:

Yes, indeed.

McGRATH J:

Do we know what those applications were?

SOLICITOR-GENERAL:

Yes Your Honour. I think most of them are in the, we've found in the supplementary case on appeal which has been filed, and I think that these related to a request for the 111 tape.

McGRATH J:

Okay.

SOLICITOR-GENERAL:

I think they are set out under tab 50 Your Honour.

BLANCHARD J:

Tab?

SOLICITOR-GENERAL:

50.

BLANCHARD J:

Tab 50 of what?

ELIAS CJ:

Supplementary.

SOLICITOR-GENERAL:

Case on appeal.

BLANCHARD J:

50, it doesn't go to 50.

ELIAS CJ:

It doesn't go to 50.

SOLICITOR-GENERAL:

Case on appeal Your Honour.

BLANCHARD J:

I think you were referring to page 50. There's an application for extension, search phone records.

SOLICITOR-GENERAL:

Sorry, just pause for one second.

ELIAS CJ:

It is at page – 96 of the first bundle of the case on appeal.

SOLICITOR-GENERAL:

Tab 50 contains an email which explains various attachments which relate to applications for tape, search of phone records, extra evidence, time extension for lawyer, 12A exemption and 111 call application.

TIPPING J:

And then the salutation.

SOLICITOR-GENERAL:

Indeed, which I won't go into.

McGRATH J:

Thank you.

SOLICITOR-GENERAL:

And the actual application, Your Honours, we found last week and they are in the supplementary case on appeal.

ELIAS CJ:

Where in the supplementary case, or are they?

SOLICITOR-GENERAL:

23 through to 26 I gather, inclusive.

ELIAS CJ:

I see, thank you.

SOLICITOR-GENERAL:

And 49 apparently as well.

MR PETRYSZICK:

And 22 Your Honour.

SOLICITOR-GENERAL:

The appellant says they were also under 49 but I don't – at page 49, sorry, tab 29.

Included in the supplementary case on appeal, the Crown's submissions on the 25th of June under tab 19, those submissions were filed by the Crown based upon the 10 grounds of appeal set out in the notice of appeal. Each of the 10 grounds is addressed, and of particular importance for the present purposes is the fact that the two grounds that the appellant, through his counsel, wishes to adjourn the case to explore further, are dealt with under paragraph 11 and paragraph 19. So as at the 25th of June, all matters which the appellant wanted to advance as identified in his notice of appeal, and in particular the two points which were wanting to be explored further were addressed by the Crown in written submissions.

We then come on to the 15th of October. On the 15th of October, counsel who has had 10 hours of legal aid allocated, seeks a further adjournment so as to explore two matters identified in the notice of appeal, namely the allegation that the registrar had contaminated the jury pool, and secondly, that there was something invalid about the search warrant that was issued to enable the Crown to get the telephone records relating to the time when the incident occurred.

As the Crown had pointed out in its written submissions of the 25th of June, there was simply no factual material before the Court in relation to the suggestion that the registrar had acted inappropriately. And on the 15th of October, counsel appointed to assist to represent the appellant appears not to have advanced any information whatsoever that could shed any light on this particular allegation. All there was, was the suggestion that this might be worth exploring further.

The Court had before it the material relevant to the issue of the search warrant. It had the application, and it had the warrant, and it was able to examine those documents and recognise that the warrant had been issued validly, that it was relevant, because it provided a rebuttal to the appellant's explanation that he had stopped to take a telephone call and that the incident occurred as a result of that, when in fact, the records revealed that there had

been no phone call to and from his phone at the relevant time. So the Court was left with two matters which were said to be worthy of further exploration. There was simply no material before the Court that would justify a further adjournment because simply, no material was put in relation to this allegation that the registrar had acted inappropriately. One would have thought that if there was anything to support that, some form of information would have been made available as to who said what to whom and when. And in relation to the search warrant issue, the Court was fully seized of the relevant material and able to form a view about that particular matter.

BLANCHARD J:

Mr Collins, what had the Court said in advance of the hearing would be the purpose of the hearing? Had there been reference to striking out, or had it simply said, "We'll be hearing the appeal?"

SOLICITOR-GENERAL:

It had said, "We'll be hearing the appeal." It had also made it very clear on two occasions, "This is your last chance."

TIPPING J:

This was a hearing date with about three months lead time, wasn't it?

SOLICITOR-GENERAL:

Correct, Sir.

BLANCHARD J:

So, was the first mention of striking out the appeal, for want of prosecution I assume, or for non-compliance with rules, is that, that first mentioned at the oral hearing?

SOLICITOR-GENERAL:

It depends on how one interprets the words "last chance." There is no express statement prior to the 15th of October –

BLANCHARD J:

Well I would have interpreted "last chance" as being last chance to put up your case.

SOLICITOR-GENERAL:

Yes, and failure to do so implicitly carries certain consequences, and that is against the background of constant refrains from the Court in its various minutes, for the need to get on with the appeal. For example, tab 44 of the case on appeal, in paragraph 3, Your Honour.

So, whether it needed to or not, the Court examined the information that was before it when it considered the application for an adjournment. The fact that that information might have been not nearly as detailed as one would normally expect for a Court to consider an issue of this kind, is entirely due to the appellant's failure to avail himself of the opportunities that had been afforded to him on multiple occasions to advance his appeal.

The Court could only reach a decision on the basis of the information which the appellant had made available to it, and of course, it was entitled to take into account the submissions of the 25th of June from the Crown. When the Court looked at that material, it reached the only conclusion that it could, namely, there just simply is no basis available to the appellant to suggest that these provide grounds for an adjournment or any form of meritorious grounds of appeal.

So, to the extent that the appellant says that he wasn't heard, the Court was entirely correct to say, if he believes he was not heard, that is because he failed to avail himself of the multiple opportunities that were afforded to him.

BLANCHARD J:
I'm just looking to see whether the Court reported to strike out the appeal. It doesn't seem to have done that.

TIPPING J:
It dismissed it.

SOLICITOR-GENERAL:
Dismissed it.

TIPPING J:
After considering the two matters that were said to be the only ones worth pursuing, or might be worth pursuing.

SOLICITOR-GENERAL:
Which is why I come back to my analysis being that they could only have done so under section 385.

Now, Your Honour the Chief Justice, before the morning adjournment, articulated three alternatives which might be available to the Court, and I interrupted Your Honour I think whilst you were articulating those and said the Court did two of those. And I believe that in reality that's what happened on the 30th of June and on the 7th of September. But Your Honour raised the possibility –

ELIAS CJ:

I was referring to how the Court could signal what was to happen in advance so that the appellant was in no doubt.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

There is no indication that the Court would deal with the matter on the – well, you have to read a lot into it to say that the Court had signalled that it would determine the appeal on whatever material was before the Court.

SOLICITOR-GENERAL:

With respect, I don't think you have to interpret much at all. It said, "This case has been set down for hearing a long way out. That is to enable the appellant to put all matters before the Court that he wants to advance. If he doesn't do so, then we will not be able to be accused of failing to provide him with an opportunity to be heard. This is his last chance. There have been multiple delays. He has been overindulged." I don't know what more the Court could really have said.

But it was the third of the options that Your Honour suggested might be available which I wanted to address squarely if I may, Your Honour? And that was the suggestion, well the appeal could be held in abeyance. I don't know if Your Honour used the word abeyance but that was the –

ELIAS CJ:

Unless you provide written submissions we won't hear.

SOLICITOR-GENERAL:

Yes, so the appeal remains extant.

ELIAS CJ:

The appeal, yes.

SOLICITOR-GENERAL:

It remains extant and then might be activated at some point in the future if you get round to filing submissions. That's the scenario which I interpreted Your Honour as saying. And with the greatest of respect, I think I need to emphasise that that would be quite an unsatisfactory outcome, and it goes to a lot more that simple administrative convenience.

There is a great virtue in finality in criminal proceedings. It's incredibly important for complainants, for example, to know that their engagement with the criminal justice system is at an end. It's incredibly important to know that exhibits no longer have to be retained. If there is to be a fear of a retrial, that fear can't just simply linger indefinitely, and in Canada and –

ELIAS CJ:

Is there any expiry, any deemed abandoned provision still in either the legislation or the rules?

SOLICITOR-GENERAL:

No.

ELIAS CJ:

No, so it wouldn't have a backstop of after a certain amount of effluxion of time it would be deemed abandoned, no?

SOLICITOR-GENERAL:

Correct.

ELIAS CJ:

Yes, I see.

SOLICITOR-GENERAL:

So, there is a drawing of the line, if I can express it as that.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

In all jurisdictions. In all jurisdictions, and then if a truly exceptional meritorious case emerges where –

ELIAS CJ:

You can re-hear.

SOLICITOR-GENERAL:

– there has been a failure – there can be a rehearing, absolutely, and that's what the Canadians do and, of course, that's what the Court of Appeal, with Your Honour presiding, envisaged, then permitted in *Smith*. And that is a long stop but it is, nevertheless, a true safety point in our criminal justice system. The Crown would be very perturbed if it was thought that there could be appeals remaining extant, without resolution, indefinitely, because that is quite frankly, not what section 25(h) contemplates. The obligation is to provide the opportunity for an appeal. You get on with it and you get your outcome. But indefinite lingering –

ELIAS CJ:

No, I must say I just floated that.

SOLICITOR-GENERAL:

I appreciate that Your Honour.

ELIAS CJ:

And it was partly against the thought that there might be some time constraint.

SOLICITOR-GENERAL:

Now if I could just pause and find out if there's anything that I've omitted?

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Unless I can assist the Court further, those are my submissions.

ELIAS CJ:

Thank you, Mr Solicitor. Yes Mr King.

MR KING:

If it pleases the Court, the appeal obviously raises the question of the proper approach to section 25(h) of the New Zealand Bill of Rights Act and the right to appeal according to law. It's my submission, and really, adopting comments that have been made during the course of today's hearing, that the proper approach to that would be one that attempted to reconcile the rules and sections 43, 44 and 45 with, obviously, the New Zealand Bill of Rights Act and, of course, section 385 of the Crimes Act. It would be my submission that the proper approach to that is to say that it is not open to a Court to dismiss an appeal for want of compliance with such things as the filing of written submissions. What a Court can legitimately do in those circumstances is to go on and consider the merits of the appeal in accordance with section 385.

I submit that, obviously, a significant change has occurred in recent legislation with the ability of the Court of Appeal to dismiss and/or to consider an appeal on the papers and thereby, if the merits are not apparent, to dismiss it on the papers. So, in my submission, if a person is non-compliant with orders, it is not proper to simply say, "Right, that's it. It's over. You're dismissed without any consideration of the merits." What the Court should properly do in that case is to do what it can to fulfil the obligation under section 385 of the Crimes Act to assess whether there has been a substantial miscarriage of justice.

In my submission, that is both a practical and a pragmatic step. It means that the Court does what it can to assess the merits because, of course, what needs to be avoided at all cost is the risk that something is – a miscarriage of justice is effectively, perpetuated by a Court not being able to do anything about it for procedural deficiency.

So that approach I would respectfully urge upon the Court and submit that it is not an onerous burden on the Court of Appeal. The Court does, as I've said, have the ability to dismiss an appeal on the papers. Obviously, an appellant who fails to put sufficient material before the Court risks not having everything they wanted to be considered heard, or considered by the Court of Appeal, but that must be their own fault, but it doesn't, in my submission, take away the obligation of the Court to do what it can on the basis of the material before it.

The rules themselves do not expressly say that an appeal is to be dismissed for want of procedural compliance. It certainly creates a situation where it's desirable, obviously, that people do comply. But, it doesn't say, "Unless you do this, the appeal will be dismissed without a consideration of its merits." I would submit that, reading the powers of section 45, to say that it does permit it to be dismissed without any consideration of the merits, may well be taking the point too far. It's noted this Court, of course, does have that express power in the rules. The same is to be conferred to the Court of Appeal as the primary, and the appeal as of right, as opposed to the appeal as of leave, and there's a marked difference in my submission.

BLANCHARD J:

And there's no Bill of Rights guarantee of a second appeal.

MR KING:

That's precisely right Sir. It's a leave application process. The person's already, presumably, been availed of a right of an appeal unless it's a leapfrog, and that would have been a considered approach. But as far as the Court of Appeal is concerned, in my submission, that is the right to an appeal according to law. It means that it's not to be dismissed for want of process but, obviously, if you don't put anything before the Court, the Court's going to be hamstrung really, in assessing the merits as you would want them to do. But that, in my submission, is properly visited upon an appellant who doesn't comply with those requirements.

I suppose it really highlights attention between the roles of the Courts in these matters. We have an undeniable adversarial system in all areas of law. It's really incumbent on the parties to put forward their arguments as best that they can. The Court, of course, does what it can but it is not an investigative role in that European sense of the term, and that really does put some obligations on an appellant to put the material before the Court. Certainly, I would submit that an approach along those lines is entirely consistent with the approaches of the other jurisdictions, which have been very well and fully put before this honourable Court.

So I would submit – I keep saying "I" because, of course, I'm not acting for the appellant in these proceedings. I would urge upon the Court an approach whereby it's made clear that the Court of Appeal cannot simply dismiss an appeal without any consideration of the merits, but, obviously, if nothing's before it, then there's little ability for it to advance it too much further. But it should, in my submission, be approached on a 385 basis, a substantial miscarriage of justice.

In this particular case, if I can turn to that, the immediate impression one perhaps gets coming into it, and just being inundated with this material and a chronology, is that the appellant really was disengaging in the process and was just not willing to comply with the requirements of filing submissions and so on. But on a closer analysis, it's my respectful submission, that what we in fact have, is a person who was extremely concerned about his appeal, who was very actively trying to get his day in Court so that his arguments could be heard and canvassed.

And I've spoken with him at some length this morning before the proceedings. He's shown me, taken me through. He kept a day-to-day diary really, setting out as he has referred to. But the starting point is that he filed his notice of appeal and this, of course, is in tab 1 of the case on appeal, and he set out a large number of grounds for appeal. It's 10 numerically but

some of those had multiple components to them. For example, ground 7, that the Judge, among other things, inadequately directed the jury as to their function regarding the findings and so on, did not reasonably summarise the defence case, did not advise the jury as to the burden of proof and what was required to be proved to satisfy the charge of assault with a weapon, and handling the case to the jury.

These were the grounds of appeal that he had set out. Ultimately, of course, only two aspects of this were the subject of any type of consideration by the Court of Appeal. There was no abandonment by the appellant of the remaining grounds. There was no consideration given to them and, when one looks carefully at the arguments that were advanced on his behalf, they were very limited but they were not restrictive. Essentially, no arguments were advanced on his behalf as such. What was done was, counsel sought an adjournment, saying that so far they have been able to identify two grounds which were worthy of investigation.

It's significant, in my submission that they were not cutting off any other grounds of appeal. They were simply advising the Court in the context of an application for an adjournment that, to that point they had only been able to identify two grounds. There's no abandonment of the other grounds in that, either expressly or inherently. It's simply saying, "At the stage we're at now, where we think we need an adjournment because these matters need to be looked at. We've identified these two as requiring further investigation."

TIPPING J:

What steps do you say the Court should take when faced with something like paragraph 7 Mr King?

MR KING:

The search warrant?

TIPPING J:

No, no, the complaint about the Judge, and primarily, the summing up.

MR KING:

Yes, what I say at the very least, the Court should consider summing up and there's no evidence in the course of the judgment that that was considered.

TIPPING J:

But was it actually transcribed? Presumably it was.

MR KING:

It would have been in a casebook, yes.

TIPPING J:

Yes.

MR KING:

But there's no reference in that, and that's the point I'm coming to Sir, is that only two of these received any type of consideration, but the others should have. Albeit it's difficult to move beyond that but a consideration of an appeal on the papers, the papers in this case – well, effectively it's what it was, I'm submitting, required all the material be considered; the lengthy submissions that had been alluded to by the appellant. He'd identified a number of issues in various correspondence and various forms to the Court.

And perhaps, can I just, before going into what the Court of Appeal actually did, can I just identify for the Court something of the process that took place, because what's been submitted really, is that from the filing of the notice of appeal, in fact beforehand, because we know the appellant had already complained to the Solicitor, or the Deputy Solicitor-General, about the prosecution alleged of misconduct, is that he has identified these areas right through day one, and it's my submission that, when one looks at the file fairly, he has pursued, in his requests throughout, for access to the transcript of the closing address of the prosecutor and to the 111 call. That is something that in numerous communications it is identified, right up to close to the hearing. We have the applications that were filed in July, and they're at tabs 22 onwards of the supplementary case on appeal, only very recently received. We have express applications for exemption of rule 12A(2)(a). So we have a person that is, having been alluded to the requirements, is certainly coming up.

TIPPING J:

The Crown's submissions, and I'm sorry I haven't, I don't - I remember looking at them earlier but I haven't got them in my mind at the moment Mr King, presumably traversed the matters that are referred to in the 10 grounds of appeal. Am I right in thinking that?

MR KING:

Yes.

TIPPING J:

So why couldn't – I know the Court didn't, as it were, articulate. Is one not entitled to assume that the Court had satisfied itself, from the Crown's submissions, that there was nothing in those points, or do you say, they've got to go through the express articulation of that exercise?

MR KING:

Well I would submit that, that is what's required. I mean, obviously, that can be dealt with very briefly.

TIPPING J:

Yes, so it's really the line's a find one, dependent, in your submission, on the fact they didn't even refer to them?

MR KING:

Indeed, and in my submission, what seems quite clear coming through on the judgment, is that they really simply focussed on the two grounds which counsel were seeking an adjournment to investigate further, and really, in that way, narrowed the whole appeal down to a consideration of those two issues without really, any thought given to the balance of their submissions.

TIPPING J:

So they should have said, "In all other respects we accept the submissions for the Crown," or something like that. The point's as fine as that.

MR KING:

Well, I'm submitting, Sir, that they really should have given some genuine consideration to the case and, for example, an affidavit had been filed –

TIPPING J:

Well, they did actually not give judgment on the spot.

MR KING:

No, that's true.

TIPPING J:

They reserved, very unusually I would have thought, if they were going to sort of, simply, peremptorily, dismiss. They reserved for about two weeks, which I find quite interesting.

MR KING:

There's no real explanation in there as to why they took that course, but what is clear, I submit –

ELIAS CJ:

It's a CAD.

TIPPING J:

It's a CAD, yes, as the Chair said, but still, I mean, experience lets one believe that if it's peremptory, you know, it would be dealt with on the spot.

MR KING:

Yes, and that's part of the difficulty is that it's –

ELIAS CJ:

That's not the practice observed at the moment.

TIPPING J:

Is it not the practice observed at the moment?

ANDERSON J:

One might have hoped that they'd say in their judgment, "We have examined the transcript...

MR KING:

The summing up.

ANDERSON J:

"...the summing up. We've examined the evidence..."

MR KING:

"We've considered the grounds raised in the notice of appeal."

ANDERSON J:

"In view of the grounds appearing in 7, 8 and 9," or whatever, "and we're satisfied there's no merit in those."

TIPPING J:

That would be the counsel of perfection certainly.

MR KING:

Yes, instead what we have –

TIPPING J:

And maybe it's required.

MR KING:

But can I just take you through because I think there are some actual factors around this.

TIPPING J:

Well I think this is close to the heart of whatever merit this appeal's at.

MR KING:

It is.

ELIAS CJ:

I'm sorry Mr King, can you just give me the reference to the Crown's submissions. I don't want to hold you up but just give me the reference again.

MR KING:

Yes. It's supplementary booklet at tab 19.

ELIAS CJ:

Yes, thank you, carry on.

MR KING:

So we have the appellant having filed his notice of appeal. We then have him filing full applications seeking the transcripts that he regarded as significant in being able to pursue it.

If we turn to the supplementary casebook under tab 25, we have the actual request for the record of 111 recording. We have him constantly referring to that, in my submission, as well as the transcript of the closing address. And an affidavit is filed.

BLANCHARD J:

I think we were told this morning that the transcript of the closing address was provided.

MR KING:

There was a transcript –

BLANCHARD J:

I think Mr Solicitor said the 6th of August.

MR KING:

Yes, the transcript of the closing address was provided. The appellant's concern was he did not consider that to be an accurate transcript of what was said.

ELIAS CJ:

He wanted the tape.

MR KING:

He wanted the tape of what was actually said. To that end and affidavit was filed, and this is contained under the original casebook, under tab 49. Mr Crequer, who had been at the hearing, deposed that he had heard the prosecutor say in his summing up words to the effect that, "The defendant had been proved to be a liar and that because the witness had told the same story as the defendant, that meant that the witness was a liar. No words to that effect are included in what has been provided by the Court as a written transcript of what was said. I heard what was said and the transcript is not the same as what I have heard."

So that really started a process whereby the appellant was seeking access to the actual tape recording of the closing address, or of the trial, primarily the closing address, so he could advance that ground of appeal and, on the face of it, if the prosecutor is making comments along those lines, but has not put it in cross-examination and so on, then there's an issue there. One can't realistically assess the merits on it, but certainly, as far as the appellant was concerned, it was an important way for him to be able to advance his appeal.

If we go then through what transpired. We have under tab 60, the minute of Justice Glazebrook, where she says at paragraph 4, "Mr Petryszick has made a number of applications to the Court dated 7 July. These can be dealt with at the hearing on 15 October." And so that was, of course, his request to be provided with a copy of the transcript. His request of the 111 call and his request to be provided with the –

BLANCHARD J:

Well he would have had the transcript before then wouldn't he?

MR KING:

Well, the 111 transcript it seems –

BLANCHARD J:

Sorry, I'm talking about the transcript of the closing addresses.

MR KING:

Yes, that's right. There's the tape, but he had the transcript but not the tape, of the closing.

ANDERSON J:

Well he couldn't expect to get physical custody of the tape. What would normally happen is that it would be entrusted to an independent expert to listen to and report to the Court.

MR KING:

Yes, or a copy could – it could be made available for him to come to the Court and to listen to it. But in the new material that we have, the supplementary material, we can see the extent to which he, the appellant, was seeking this information, and I'm referring specifically to the 2 September 2009 memorandum, which is at tab 30 of the supplementary materials. We have the hand notation, "Can we please have available the audio tape of the trial and the 111 call in Court on 15 October 2009." So, in September it's still being pursued.

We have a further email, which is under tab 32, where we have the request there for the audio tape of the trial if available, and the audio record of the 111 call. We have the 10th of September, another memorandum which seems to indicate that there's, "A copy of the CD has been sent today to the Court of Appeal." Unfortunately an audio tape of the 111 is never presented.

Now, there's no discussion in the course of the hearing on the 15th of October about that material, despite the fact it had been flagged in the minute of Her Honour, Justice Glazebrook, that it would be something that will be considered. So, throughout, from the notice of appeal right through to the days and weeks before the appeal, the appellant is actively seeking this material and making it clear that he considers it to be very important.

There are also issues about the legal representation and I submit that this is significant. Throughout the Court minutes that are on the record, there is criticism of the appellant for not availing himself of legal aid, but the difficulties in that regard are, in fact, highlighted by a number of letters which have now come to light and are in the supplementary material. The first of these of relevance is under tab 53, a letter from the Court purporting to send the appellant a legal aid form, dated the 24th of August 2009.

TIPPING J:

Sorry, can you just pause, I don't seem to –

ELIAS CJ:

The tab 53 isn't in the supplementary.

MR KING:

Sorry, tab 54 – no, sorry, of the original case on appeal, apologies, tab 54, sorry.

ELIAS CJ:

Thank you.

MR KING:

Sorry tab 53. We have a letter enclosing the legal aid form being sent, and this is the 24th of August, but you'll note that it is sent to PO Box 747.

We then go forward to tab 57 and we have another letter, "Further to our telephone conversation yesterday, as requested please find enclosed a further legal aid form and copies of the attachments and emails you've sent to the Court of Appeal." Again, you'll note, 2nd of September 2009, addressed to PO Box 747.

Under tab 58, and this is perhaps an aside, we have the customary six week letter, and you'll note that that is addressed to PO Box 727 at the same facility. But, the point I want to make about this letter is what it does not advise an appellant are the consequences of failure to comply with those rules. And it would be my submission that if this Court were to accept the respondent's position that the Court of Appeal can dismiss an appeal without any type of consideration on the merits whatsoever, pursuant to the rules 43, 44 and 45 et cetera, then that should really be spelt out in this completely standard form, six week letter. Appellants at the very least should be given that really clear notification that unless you do it, unless you comply, we're just going to dismiss it. And in any event, even if the Court doesn't accept that respondent's position but prefers to approach, that if you don't comply the Court will simply do what it can on the material that's before it to assess, then that should be spelt out as well. So I make that point.

But really, where I was coming to with the earlier letters and the 747 PO Box is, if one turns then to tab 59 one has the letter to the appellant, again addressed to the correct address of PO Box 727, and you can see, "That I have received a phone call today from an officer at Northland Regional Corrections Facility to enquire after the mail I had sent you last week and the week before. Speaking to the officer we realised that I had accidentally sent the letters to PO Box 747 instead of PO Box 727. It is usual for mail with an incorrect address to be returned to the Court, returned to sender but that obviously hasn't happened."

So, at the same time when the Court has been highly critical of the appellant for not engaging a legal aid lawyer, what we have is that the 7th of September is the date when he's actually getting the legal aid forms. Now, whether he could have got them earlier or not, but that's the – they were being sent by the Court to the wrong address and he wasn't receiving them. Obviously, he was following up on that because you can see that the officer from the facility is

obviously phoning on his behalf to say, "Well where are those forms that you said you'd sent me."

Now, the date's significant again. This is only about six weeks out from the hearing of the appeal. So, at this point in time, the appellant doesn't have legal representation. He has throughout, made it clear to the Court in various correspondence, and it's referred to in some of the minutes, that he was having real difficulty in obtaining lawyers, and he referred to that this morning in his submissions. He spoke to many, and some would initially express an interest but then would, perhaps running for cover and realising how much was involved and would have to be dealt with. He, in my respectful submission, can quite properly be believed when he says he was having a real difficulty in finding a lawyer.

Now, to this point in time, all of the delay that has been accustomed us, has been delay which has occurred by an unrepresented person, who has, in my submission, been trying to obtain information that he considered was crucial for his appeal. An affidavit had been filed. He'd prepared applications in all of these matters. None of that had actually been dealt with before the hearing of the appeal. The closest we get is emails I've referred the Court to where steps were taken to try and source this material and say, "Well, we'll consider it at the hearing on the 15th of October." Well, he wanted that material because it was central to his appeal.

On the legal representation side, obviously the forms did eventually get to him, but we're talking about in a very short period of time before the hearing. There could have been no undue delay on him on completing those forms and sending them out because we know, and it's under tab 61, that a lawyer was assigned on the 16th of September 2009. Now there's no reference anywhere in any of the minutes or in any of the judgments, that there were problems in sending the forms to him at the wrong address. That's just not referred to. And it's quite conceivable that the Judges were not aware of that. That's a minor administrative matter. It's not something but, of course, it does create an impression that he is – when he's in telephone conferences saying, I haven't received these papers, there's a natural scepticism and perhaps disbelief that it's just another attempt to drag out the proceedings when in fact he was, as this shows, wanting the forms, chasing them up and when he did ultimately get them under a letter dated the 7th of September he obviously filled them out and sent them back quickly and we all know, with respect, of delays in the prison system. It can take days and days for a letter that's given to an officer to post, for it to actually end up in a post box but he's done that. So 16th of September, that is almost exactly one calendar month from the hearing on the 15th of October, a lawyer is assigned.

McGRATH J:

On a limited basis.

MR KING:

To prepare a summary of issues, that's precisely right, and that, of course, is the process which it is, that a person does not get legal aid as a right for an appeal. What they get is a – the services of a lawyer to investigate to see whether there are grounds. Now that's supposed to be done within 10 days but that 10-day requirement is in all but the exceptional cases a practical impossibility. You can't get the file in that type of period, let alone undertake that type of analysis. But the processes, that the lawyer is assigned, you normally only get – you only get two hours approved if you were the trial counsel. If you weren't the trial counsel then you get four hours as of right but you can, of course, apply for an extension if more is required. In this case 10 hours was, I think, ultimately approved for that to happen. So if the lawyer had been able to prepare an opinion for the Legal Services Agency saying, these are the grounds of appeal, this is what he wants to advance, then the next step is that a grant of aid is given for the substantive hearing and that lawyer, unless the lawyer specifically does not want to be assigned, that the lawyer who prepares the summary of issues is the lawyer who is assigned. So with –

TIPPING J:

What's the purpose of the summary of issues if it is not accompanied by some sort of assessment of the merits of the –

MR KING:

Well that's what it is. It's a –

TIPPING J:

Oh it's an assessment of the merits is it?

MR KING:

That's right. So you say these are, this is what counsel considers can be argued on the appeal. It's a rather cumbersome process, this one, and it must be said that until relatively recently it was almost a rubber stamping exercise. I've submitted summaries of issues saying I just can't find anything. I've been through it with a fine tooth comb and there's just nothing in it. The next day you get a letter saying you're assigned for the appeal so –

TIPPING J:

Or bricks without straw.

BLANCHARD J:

That explains something.

MR KING:

It does, it certainly does. But nowadays it's become a lot more difficult –

ELIAS CJ:

Well it may be taking section 25(h) seriously.

MR KING:

Indeed and this – and look I actually authored this process for the Legal Services Agency at the time of the *Taito* and *Bennett* about what do they do. Do we simply give legal aid to everyone or do we make some sort of assessment and I was consulted to design this process which is what I did. It all seemed perfectly sensible and reasonable at the time. Nowadays it's become a lot more difficult and a classic example is the Clayton Weatherston case where Mr Lithgow QC has identified grounds of appeal and they are refusing to give legal aid, but it really does seem to be a change of heart and I know it seems to be tightening up. But at this time, if I can be excused for giving evidence from the Bar, it was, it would have to be a very dire situation for legal aid to say no we're not giving you, we're not approving you for this substantive hearing. So we've got to that situation. There's been delay occasioned by the fact that the forms were being sent to the wrong address. It's eventually got to the appellant. He's filled it out, he's sent it in, a lawyer is assigned. In my submission what we now have is the case finally getting on track. The difficulties about non-compliance suddenly don't become the appellant's problem, they become counsel's problem. It is counsel's obligation at that point in time to do what they can. Obviously if they're in an impossible situation they can apply for leave for withdraw and so on but there's no suggestion that any of those steps were done.

Counsel's onus has been noted "assigned on a limited basis." They're not actually assigned at that point in time to appear in the Court and argue the merits of the appeal. They're assigned purely to make representations to the Legal Services Agency. In this case counsel are to be commended for getting onto the job as quickly as they realistically could. Having undertaken some sort of assessment, although by far not to be considered a full assessment of the case, had identified, at that stage, two matters which they considered were worthy of further investigation without, in my submission, abandoning the other issues raised by the appellant and I submit that's significant.

TIPPING J:

Mr King, would you mind, it may take us nowhere but something I've just noticed, tab 62 –

MR KING:

Yes.

TIPPING J:

– is a letter from the Court to Mr – to the counsel assigned saying that the Court of Appeal fixtures manager will be in contact with you in due course to arrange a hearing date.

MR KING:

That's stock standard. In fact –

TIPPING J:

But the hearing date, it was already known it had been fixed from –

MR KING:

Oh good point. Yes.

TIPPING J:

Been fixed –

MR KING:

That's right.

TIPPING J:

– from the end of June.

MR KING:

That's exactly right.

TIPPING J:

It seems a rather peculiar way to go about it.

MR KING:

Yes and that's very sensible because of course counsel's only been assigned on the 16th of September.

TIPPING J:

Yes. You wouldn't know anything.

MR KING:

Would have got notification on the 17th of September, and with no disrespect, and certainly not to this particular counsel, but to any counsel.

TIPPING J:

Well these standard form of letters that go roaring around of course ought to be –

MR KING:

You work to timetables.

TIPPING J:

Ought to be adjourned to the particular case.

MR KING:

Yes. You work to your timetable.

TIPPING J:

Well, you wouldn't have thought there was any particular urgency if you got a letter like that.

MR KING:

No. Indeed. And in my submission that's – I hadn't appreciated that but I embrace that entirely because I just know as an appellate lawyer that you often get these letters before legal aid's even been resolved at all. Someone puts in a notice of appeal with your name on it, which often, of course, you had no prior knowledge of it or someone's just heard –

TIPPING J:

Well presumably one can infer there may not be anything on it but at some stage counsel who was assigned was told that there already was a fixture date –

MR KING:

Well they turned up –

TIPPING J:

And sort of panic stations.

MR KING:

Well junior counsel turned up.

TIPPING J:

Or junior counsel turned up, yes.

MR KING:

Turned up to argue for an adjournment. I mean there's no suggestion that submissions were filed –

TIPPING J:

And they didn't –

MR KING:

– or anything of that nature.

TIPPING J:

– presumably take any point about this letter but I can understand how one might have been put off one's guard, if you like, by receiving a letter like that.

MR KING:

Absolutely and of course the six week letter for the filing of submissions and so on didn't go to counsel and was not repeated – was not re-sent to counsel at that point in time and that's the critical letter which means are things on track, is there going to be a request for an adjournment, have you complied with the requirements and so on. As we say the six-week letter which is under, I'll just go back to it, under tab 58, is dated the 3rd of September, that's before counsel are assigned but it's sent to the appellant. There's no, nothing to – and I might be wrong –

TIPPING J:

See the counsel who is then assigned in the light of that doesn't get sent a copy of the –

MR KING:

Yes.

TIPPING J:

Good Lord.

MR KING:

Well because it's less than six weeks at that time so the letter –

TIPPING J:

Well but at least you get some –

MR KING:

Yes. I mean that, I think –

TIPPING J:

Is the theory that the client is supposed to tell counsel?

MR KING:

And of course the shocking reality in this case is that the appellant was just being moved from pillar to post. If you look through it, I mean it was five prisons in that time? There's Tongariro, there's Waikeria, there's Northland, Rimutaka, Mt Eden Prison –

TIPPING J:

Well I don't want to start that sort of hare running Mr King.

MR KING:

No but it was, it's a really difficult situation for an appellant to be in where they're being moved, no one's notifying the Court of Appeal that they're being moved, there's all of this happening in the background. The point that I want to make on the appellant's behalf is that by the time we get to the final hearing, as it was, on the 15th of October, things were actually on track, in my submission. Okay it was not able to be progressed on that day, but for very sound reasons. Counsel had only just been assigned. Some of the reason for the delay in that was clearly because of administrative difficulties and getting the addresses wrong for the forms and so on. I'm not suggesting for one moment that that's the whole explanation, but there we are. On the 15th of October counsel has appeared for him, the first time in these proceedings, a lawyer has stood up to try and represent his interests.

ANDERSON J:

With respect, Mr King, I am having difficulty seeing the relevance to the ground of appeal of all this detail. It's not an examination of the merits of what they did in terms of the ground.

MR KING:

Well with the greatest of respect Sir the question is, has he been denied his right to appeal. That necessarily, well certainly the interpretation I'd taken Sir, was that that involved – I'm not talking about the merits but I'm talking about what actually led to it. Did he avail himself of that opportunity? The respondents are saying that he had every opportunity. I'm submitting on his behalf that, in fact, that submission requires closer scrutiny and that an interpretation available to this Court is that by the time we get to the final hearing date, he is trying to avail himself, doing everything he can at that time, to avail himself of the opportunity to appeal and that that was denied him.

So the process by which counsel came to be involved, in my submission, it was clearly not considered by the Court of Appeal. They probably weren't aware of all of these particular issues although counsel did his best to notify them to the Court, but the point being that if an adjournment had been granted at that point in time then it would have enabled the appeal process to follow that orthodox course. Counsel investigates, counsel refers back to the Agency, the Agency makes a decision. If aid is granted he is availed of his day in Court. The only downside, of course, is that it could not all occur on that timeframe that was imposed upon him by the Court.

The Court of Appeal adopted another approach. They didn't purport to dismiss this appeal for want of prosecution or for non-compliance or for procedural defects in full. Obviously that was a very significant part of their rationale. It obviously was underlying their reason for not granting an adjournment. In the normal course of a case if counsel had sought an adjournment with those reasons, I've only just been assigned and so on, then the Court would usually, one would expect them to look at that rather sympathetically.

The Court purported to consider the merits but counsel was not there to advance the merits. Counsel made it clear they were unable to advance the merits. Counsel was simply seeking an adjournment. That did not, I submit, take away the obligation of the Court to, if they weren't going to grant an adjournment, to at least give as full a consideration as they could on the papers. The papers including all the transcripts, the summing ups, the affidavit that had been filed by the appellant saying what he had claimed he had heard the prosecutor say, all of the material. The applications which the appellant had been advancing from day 1, effectively to get access to this other information, which was to be dealt with at the hearing, clearly wasn't. Her Honour Justice Glazebrook had given a minute, the minute is given to the appellant saying that those applications will be considered at that hearing and they're not.

So it's the submission of the – of me overall that obviously the Court needs to be able to regulate its own process. Obviously the right to appeal is qualified according to law. That means that there is an obligation on an appellant if they want their case to be advanced in the best possible way, to be proactive in doing that. If they don't it means that their case may not be advanced in the way they would hope but nevertheless the Court of Appeal has that obligation pursuant to section 25(h) and pursuant to section 385 of the Crimes Act to assess whether there has been a miscarriage of justice or a substantial miscarriage of justice. That in this particular case the Court of Appeal itself did note in respect of the so-called juror panel issue, that they weren't able to properly assess the merit. There were other matters raised in the notice of appeal that should have been the subject of some scrutiny but ultimately, in my respectful submission, despite the catalogue of delays and the catalogue of non-compliance things were finally on track. Counsel was there, he hadn't been able to get counsel before.

He got one there, they were seeking an adjournment to investigate it. It should have been granted. And really I suspect that's as far as I can take things.

ELIAS CJ:

Thank you Mr King.

MR KING:

As the Court pleases.

SOLICITOR-GENERAL:

Could I have the indulgence of just responding on one point?

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

I ask to do so because normally I would be the respondent and going last. It just concerns the representations that had been made about access to a lawyer. The Court records will show that in the supplementary case on appeal under tab 1 on the 16th of May 2008, the delayed forms were sent. Again on the 18th of May 2008, and that's in the case on appeal under tab 39, the supplementary case on appeal under tab 17, and again on the 23rd of January 2009, and that's in the case on appeal under tab 40, and indeed –

TIPPING J:

What was that second date Mr Solicitor?

SOLICITOR-GENERAL:

18th of May 2008. We had 16 May 2008, 18 May 2008, 23 January 2009. So there were – and we also have in the case on appeal references from Justice Chambers in August of 2008 where he'd said the appellant will be granted legal aid and I won't make my submissions –

ELIAS CJ:

He said the appellant would be granted legal aid?

SOLICITOR-GENERAL:

Has been granted.

ELIAS CJ:

Oh has been.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

We'll check that. Thank you. Mr Petryszick, is there anything that you want to add in response to what's been said?

MR PETRYSZICK:

I'm not –

ELIAS CJ:

Come to the podium. We can only hear you in reply at this stage.

MR PETRYSZICK:

Yes, yes.

ELIAS CJ:

That's the sequence we follow.

MR PETRYSZICK:

Now the legal aid forms that he's referring to in 2008, I did not have a lawyer allocated then and if I go through my diary I can actually go through the list of lawyers and the names, the phone numbers and the time of day and the date and everything that I've rung around these lawyers and stuff and got nowhere. Justice Chambers actually stated in that, just going from memory, he's basically stated in that first minute that he did, that if I hadn't by a certain date appointed a lawyer then Legal Aid Services is to actually appoint one for me so – which never happened and the other side of it is, like, if he wants to sort of like put the argument forward, well he had the forms in his kit, he could have used the forms he had in his kit, well I did a, started my jail sentence on the 3rd of April 2008 and then got released on April Fool's Day 2009.

Now the – I was out for about three months and then I had the hearing with Justice Hammond and then I just managed to get all the submissions and everything done as per time including the application for an extension. Now with the Justice Hammond ruling, with Hammond, Keane and France, I'm not too sure what the number is, I could possibly read it for you, he did make provision for me that if I was going to seek counsel then – that if I put an application in he will, ah, "Mr Petryszick is to be represented by counsel then the name of that counsel is to be notified to the registrar to the Court of Appeal and to the Crown within 14 days." This is section 4(b), within 14 days. And then at the bottom, "If Mr Petryszick wishes to extend this 14 day period for an appointed lawyer he must make a formal application setting out the

reasons for support." Well I did do that and they were submitted and the Court of Appeal had them but I think the only –

ELIAS CJ:

Do we have this material? Perhaps I'll just confer with counsel. Can you just check, I just want to make sure we've got everything?

SOLICITOR-GENERAL:

Is this in the case on appeal?

MR PETRYSZICK:

Yes, you've been quoting it quite largely.

SOLICITOR-GENERAL:

This is the 30th of June.

ELIAS CJ:

30th of June, thank you, we've identified it.

MR PETRYSZICK:

Sorry about that. So I had been complying. I had been doing what I'd done and I'd put those paperwork and stuff in and, um, Mr King, who I think done an exceptional job, ah, actually I was of the opinion, I didn't think he was going to, but okay, the –

ELIAS CJ:

We always think that and we always come around.

MR PETRYSZICK:

After what I've been through for the last two years, nothing surprises me. The other side of it is too is you've got to remember while I'm doing these submissions and stuff at night that you guys have for the Supreme Court and all the rulings and trying to make these time factors and all the rest of it, influences within the prison services is making my life a living hell so it's not just like I'm at home –

ELIAS CJ:

I don't think you need to enlarge on that. I think we do have some insight into that.

MR PETRYSZICK:

Yes and as soon as I lodged the application they send me down to Mt Eden Prison because they know it's going to interfere with me being able to meet the time schedules and things like

this. There's more behind this. And I think the basic underlying fundamental problem with this whole case is that we're talking a non-injury push bike accident. We're not talking about a rape or a murder or anything serious. This is just a –

ELIAS CJ:

But you understand that we have to deal with it on the basis that this principle applies across the board?

MR PETRYSZICK:

Yes, that's correct, but out of everybody here in this room today I'm the only one that's suffered from all this, you know, I'm the one that's had to sort of like have some pretty unsavoury characters coming into my cell during the day and telling me that, give me your TV and your shoes else we're going to stab you and this is the sort of environment that I am trying to work within and people don't understand that. You know, just fighting for your meals and stuff because if you don't hand part of your meal over then you get the bash in the yard tomorrow. There's – it's, you know, and I'm doing all this right from the get go from a prison cell.

ELIAS CJ:

I think we would accept that.

MR PETRYSZICK:

So, yes, so it's not –

ELIAS CJ:

That that is a disadvantage.

MR PETRYSZICK:

And the other – the serious part here though is that the Crown have actually brought – raised this matter so they've brought the matter into question about what the charge is and the rulings and all the rest of it. The whole underlying matter with this, could I be permitted to read just a little paragraph out of here?

ELIAS CJ:

Sorry what's the point you're making here?

MR PETRYSZICK:

Well the point I'm making here is that *R v Hart*, 1936, by the Lord Chief Justice, he makes it very, very clear what the rules are and I think what the underlying problem is here is the Crown does not want me getting a hold of a copy of that tape because it not only proves that

that Crown solicitor used trickery to fool the jury, it also proves that the transcripts were doctored to hide the fact, so we've not just got a thing here, we've got people's, other people's careers on the line here now because I lost a complaint and everything before I was even sentenced. Mr Collins here, he's known about this problem right from the get go and he chose to do nothing.

ELIAS CJ:

Just pause for a moment.

MR PETRYSZICK:

So he's more – yes, sorry.

ELIAS CJ:

Again that's really background and –

MR PETRYSZICK:

Yes, but to me it's not background.

ELIAS CJ:

I –

MR PETRYSZICK:

You can understand that.

ELIAS CJ:

I appreciate that but in terms of what we have to concentrate on it is the legal point.

TIPPING J:

I think Mr King made such a good job for you that you're probably wise to quit while you're ahead.

MR PETRYSZICK:

I was thinking that myself, that's why I made that comment at the start. I have a bit of a habit of being verbose and running all over the place and what not as you do. But the underlying problem here is that I was doing everything that I could possibly do with – you know, you don't get unlocked until 8.30 in the morning so you've got to line up with everybody else to make a legal call and I was at Mt Eden Prison for over a month down there and I never made it to the front of the queue to even make a family call so, you know, this is – it's not easy. You don't have access to the Internet so I'm having to rely on sending a letter out to a friend. Now I

sent two at a time to make sure one of them gets there to two different addresses and then I asked for something and then sort of after the letter has gone out and then comes back, if I'm lucky, they might let me have it. If they –

ELIAS CJ:

Mr Petryszick, for myself –

MR PETRYSZICK:

So, yes, time factors, yes.

ELIAS CJ:

For myself I can accept that prisoners labor under a disadvantage in being able to progress matters. There's an issue as to whether –

MR PETRYSZICK:

I'm not –

ELIAS CJ:

– even taking that into account, matters should have been delayed to this extent but I think you can accept that we do understand that there is a disadvantage.

MR PETRYSZICK:

Yes I don't want to be accused of saying that the whole of the Corrections made life difficult because I could name some officers, which I won't, which bent over backwards to help me, and if it wasn't for one of those officers you would not have – we would not even be here because he made sure I got to the computer room at Mt Eden Prison and he made sure that I had what I needed, of the limited resources that they had available, and there are certain rules, I have to pay for my own photocopying and stuff and that sort of thing. But there's other points I wanted to raise about the letters and stuff as far as the – Justice Glazebrook, the way the chronology of the way that went down.

Now I actually, I've got my own copies here so I'm not to sure what the numbers are, I think Mr Hart maybe able to refer to the numbers for me. There's just – the minute of Justice Glazebrook, now we've got two letters here from the Court of Appeal and there was a little bit of an issue with some of the submissions. Four of them went through and because I did the other ones at night and – it was in a Word document format that they could not recognise, and

this was the delay with two of them, but they had the four of them in there, and it says in here that, "I received an email on the 1st of September with two further attachments in a form that I'm unable to open. These were referred to Justice Hammond on the 2nd of September." And it's my understanding that the Crown are saying that they received the actual CD that I was requiring at the – prior to that date, 2nd of September, so they did have that tape sitting there. So this has gone to Justice Hammond on the 2nd of September and then on the 7th of September Justice Glazebrook has made the ruling here on the 7th of September stating that we'd had a phone conference and that basically that, that things had been discussed. We never had a phone conference. I never spoke to her at all. I didn't even know about this until a copy of this got sent out and how can I do submissions without having the exact evidence I need to prove the *R v Hart*. That's just one point which should have been thrown out as a miscarriage of justice because he's very clear on what's a miscarriage of justice. And it almost seems to me like somebody's viewed that tape, or the CD, and did not want me to have it. It's a view that I've sort of taken for that is that technically if I get my hands on that tape it's not a pretty look when the Court's doctoring transcripts to try and hide the fact that Crown solicitors –

ELIAS CJ:

Well as –

MR PETRYSZICK:

– do things.

ELIAS CJ:

– we've indicated that really is, even though a matter of great moment to you, not a matter before us.

MR PETRYSZICK:

Well I think as far as public interest is, I think that's a pretty serious corruption scandal. I mean if we can't trust the Courts, who can we trust, and if I had had my hearing and had my day that conviction would have been overturned and –

ELIAS CJ:

Well that's the issue for us.

MR PETRYSZICK:

Yes, yes.

ELIAS CJ:

Whether you should have had that.

MR PETRYSZICK:

Yes, which is what I mentioned before with Justice McGrath. He's already overturned a conviction for them doing exactly the same thing in 2002. So - this isn't the first time I've been here, you know, been down this road so this is why I became rather pedantic and collecting paperwork and stuff like that but also not going to the stage where I've become obsessed with it so, you know, and in 2002 I thought this was going to be over. You know, the police aren't going to harass me anymore. I'd started my university and a change of career and all the rest of it. Well they didn't. They just kept coming back at me and then they had this little push bike accident, turned it into a huge big drama that I ran a guy down, then when the witness that witnessed the accident spoke the police turned up in Court after they'd been denied –

ELIAS CJ:

No Mr Petryszick, it's not relevant –

MR PETRYSZICK:

I know, I know it's not relevant.

ELIAS CJ:

– to what we have to decide so really this is an important point and we're trying to concentrate on it so try to direct your submissions to the particular point.

MR PETRYSZICK:

Yes, that basically is my point is I don't think anybody wants me to get the – to have that access to that tape.

ELIAS CJ:

I understand that that's the view that you take.

MR PETRYSZICK:

But I mean the, I did – I chased hard, phone calls, did everything I was supposed to do as far as I could. I put all the submissions in, I put the submissions in to allow me to – because they'd, as I alluded to before, that Justice Hammond did make provisions for me to extend this 14 day period for appointing a lawyer. You must make a formal application setting out the reasons. Well this was all done on time yet as soon as I done that and put that in, Court of Appeal has never done anything. They never handed anything over, never bothered to look

at anything or anything and then wham bam next thing you know I'm back in jail again on a trumped-up charge and end up being remanded in custody –

ELIAS CJ:

Totally irrelevant to what we have to decide.

MR PETRYSZICK:

I know, I know you're saying it's irrelevant but I'm making some pretty serious accusations of corruption here.

ANDERSON J:

But you diffuse the strength of the arguments that can be put up for you by going off on these side winds.

MR PETRYSZICK:

Well I know this is going to sound sort of like –

ANDERSON J:

It doesn't help you.

MR PETRYSZICK:

I know this is not going to help me at all but you're not the one that was sitting in jail for two years waiting for your day in Court, knowing that you're going to win, and then have the rug pulled out underneath you and refuse to give me the tape. Justice Glazebrook effectively refused to hand over the documentation I needed that would clear me.

ELIAS CJ:

That is what – we will look at the chronology very carefully in the light of the submissions that you've made to us and the submissions that have been put to us very effectively by Mr King.

MR PETRYSZICK:

I know, yes, but I just sort of like want my, you know, my emotional side of things and what I've been through put across to because –

ELIAS CJ:

We appreciate that, we appreciate that.

MR PETRYSZICK:

– regardless of what happens today if we go back to the appeal it's only a conviction on a piece of paper. Like realistically I can live – it's not the end of the world but it would be nice to say if this gets overturned that I haven't had a conviction in 10 years but –

ELIAS CJ:

Well it's a very important point. It is important not only for you, but for, but more generally. So I think if there's nothing else really that you want to address us on, on this point, we should probably adjourn at this stage.

MR PETRYSZICK:

I think so yes. I didn't mean to keep you going.

ELIAS CJ:

Thank you Mr Petryszick.

MR PETRYSZICK:

Thank you. I hope I've been all right.

ELIAS CJ:

No thank you. We're very much indebted for all of the submissions that we've received. Thank you Mr King, thank you Mr Solicitor.

COURT ADJOURNS: 1.09 PM