

IN THE SUPREME COURT OF NEW ZEALAND

SC 57/2013  
[2013] NZSC 95

BETWEEN	AARON PATRICK JOHN ELLIS Applicant
AND	THE QUEEN Respondent

Court: McGrath, William Young and Glazebrook JJ

Counsel: M Bott for the Applicant  
S B Edwards for the Respondent

Judgment: 8 October 2013

---

**JUDGMENT OF THE COURT**

---

- A The application for leave to appeal is dismissed.**
- B Leave is reserved to renew the application in the circumstances set out at [12].**
- 

**REASONS**

[1] On 30 May 2013, the Court of Appeal dismissed Mr Ellis' appeal against his conviction on one count of threatening to kill his brother.<sup>1</sup> The appeal was dismissed on the papers under s 338(1) of the Criminal Procedure Act 2011 for non-compliance with procedural orders.

[2] Mr Ellis applies for leave to appeal against that decision.

[3] Section 338(1) of the Criminal Procedure Act allows an appeal court to dismiss an appeal if the appellant fails to comply with procedural orders fixed for the

---

<sup>1</sup> *Ellis v R* [2013] NZCA 185.

appeal. Before doing so, the court must, under s 338(2), give the appellant 10 working days' notice of its intention to dismiss the appeal. If the appellant rectifies the non-compliance within that 10 day period, or such longer period given by the court, then s 338(3) provides that the appeal cannot be dismissed under s 338(1).

[4] In this case, the Court of Appeal gave notice of its intention to dismiss the appeal under s 338(1) of the Criminal Procedure Act in a minute of 16 April 2013. That minute gave Mr Ellis until 2 May 2013 to rectify his failure to comply with procedural directions given in earlier minutes.

[5] Mr Ellis has filed an affidavit in this Court which says that he did not receive any of the minutes of the Court of Appeal from September 2012. Mr Ellis says that the address for service (and associated e-mail) he had initially given to the Court of Appeal was that of a friend.

[6] Mr Ellis says in his affidavit that in September 2012 he had telephoned the Court of Appeal to change his address for service but that the minutes had not been sent to that new address. Instead, they had continued to be sent to his friend's address.

[7] Mr Ellis says that he had parted on acrimonious terms with his friend in September 2012 and from that point had not received any of the minutes sent by the Court of Appeal.

[8] In particular, Mr Ellis says that he did not receive the minute of 16 April 2013 until 17 May 2013 when it was e-mailed to him at his now fiancée's e-mail address.

[9] Mr Ellis has set out various matters in his affidavit (in some cases backed up by documentary evidence) which, if correct, would throw real doubt on whether he did in fact receive any of the relevant Court of Appeal minutes and in particular that of 16 April 2013.

[10] The information in Mr Ellis' affidavit does not appear to have been before the Court of Appeal when it dismissed the appeal.

[11] Rather than this Court assessing for the first time the factual matters set out in Mr Ellis' affidavit, the better course would be for Mr Ellis to apply for a recall of the Court of Appeal's judgment. That would enable the Court of Appeal to address those factual issues.

[12] Mr Ellis' application for leave to appeal is dismissed but without prejudice to his ability to file another application if his recall application is dismissed by the Court of Appeal.

Solicitors:  
Heretaunga Law for the Applicant  
Crown Law for the Respondent