

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 73/2018
[2018] NZSC 102

BETWEEN DERMOT GREGORY NOTTINGHAM
Applicant

AND HEMI TAKA, MARTIN RUSSELL HONEY
AND STEPHANIE FRANCIS HONEY
Respondents

Court: William Young, O'Regan and Ellen France JJ

Counsel: Applicant in person
D W Grove for Respondents

Judgment: 5 November 2018

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant is to pay the respondents costs of \$2,500.**
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REASONS

[1] The applicant seeks leave to appeal against a decision of the Court of Appeal¹ in which he was refused leave to appeal against two High Court decisions.² Both had their origins in a private prosecution brought by the applicant against the three respondents in the District Court. All charges were dismissed by Judge Paul³ and he ordered the applicant to pay costs totalling \$117,000 under the Costs in Criminal Cases Act 1967.⁴

¹ *Nottingham v District Court at Auckland* [2018] NZCA 345 (Asher, Brown and Clifford JJ) [*Nottingham* (CA)].

² *Nottingham v The District Court at Auckland* [2017] NZHC 1715 (Paul Davison J) [*Nottingham* (Paul Davison J)]; and *Nottingham v Honey* [2017] NZHC (Downs J) [*Nottingham* (Downs J)].

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

⁴ *Nottingham v Honey* DC Auckland CRI-2014-004-03937, 13 July 2016.

[2] The applicant sought leave to appeal against Judge Paul’s decision dismissing the charges and the award of costs. This application was brought under s 296 of the Criminal Procedure Act 2011 which provides:

296 Right of appeal

- (1) This section applies if a person has been charged with an offence.
- (2) The prosecutor or the defendant may, with the leave of the first appeal court, appeal under this subpart to that court on a question of law against a ruling by the trial court.
- (3) The question of law in a first appeal under this subpart must arise—
 - (a) in proceedings that relate to or follow the determination of the charge; or
 - (b) in the determination of the charge (including, without limitation, a conviction, an acquittal, the dismissal of the charge under section 147, or a stay of prosecution).

...

[3] In the first of the High Court decisions, Paul Davison J refused leave to appeal and, in doing so, he addressed directly the costs argument.⁵

[4] It would have been open to the applicant to have appealed, without leave, against the costs decision. This is provided for in s 271 of the Criminal Procedure Act. There is, however, a time limit which can be extended by the first appeal court.⁶ After the judgment of Paul Davison J was released, the applicant sought an extension of time under s 271 to file a separate appeal in respect of costs. This application was dismissed by Downs J on the basis that the proposed appeal would be an abuse of process.⁷

[5] By reason of s 213(3) of the Criminal Procedure Act, a decision to give or refuse leave to appeal is “final”. Rejecting an argument by the applicant to the contrary, the Court of Appeal held that this provision was applicable to the decision of Paul Davison J.⁸ It also held that s 303, which provides for rights of appeal against

⁵ *Nottingham* (Paul Davison J), above n 2, at [120]–[121].

⁶ Criminal Procedure Act 2011, s 273.

⁷ *Nottingham* (Downs J), above n 2, at [14].

⁸ *Nottingham* (CA), above n 1, at [18].

“the determination of the first appeal”, was not engaged as the decision refusing leave to appeal was not a “determination” for the purposes of that section.⁹

[6] In dealing with the challenge to the judgment of Downs J, the Court concluded that there is no right of appeal to the Court of Appeal from such a decision, citing a number of cases decided under similar provisions of the Summary Proceedings Act 1957.¹⁰ In absence of a right of appeal, the Court found it had no jurisdiction to hear a challenge to the judgment of Downs J.¹¹

[7] In support of his application for leave to appeal to this Court, in respect of the judgment of Paul Davison J, the applicant repeats the submissions advanced to and rejected by the Court of Appeal.

[8] Although the judgment of Paul Davison J is lengthy, it is perfectly clear that he dealt with the case as an application for leave to appeal under s 296 and not as a substantive appeal. The order he made was to dismiss the application for leave to appeal.¹² For the reasons given by the Court of Appeal, that decision was final. It was not susceptible to challenge in the Court of Appeal.

[9] We are likewise of the view that there was no jurisdiction to challenge in the Court of Appeal the decision by Downs J to refuse an extension of time. No such jurisdiction is conferred by the Criminal Procedure Act which provides for appeals only against the “determination of the first appeal”, an expression which does not encompass the refusal of an extension of time to appeal. In any event, if the dismissal of the application for an extension of time were to be treated as a determination of an appeal, a further appeal to the Court of Appeal would require leave (under s 276), which has been refused.

[10] This Court relevantly has jurisdiction to deal only with appeals authorised by Part 6 of the Criminal Procedure Act.¹³ The proposed appeal is not within any head

⁹ At [17] and [18].

¹⁰ At [27]–[31], citing *O’Byrne v Waimakariri District Council* [2012] NZCA, [2012] NZAR 848; and *Douglas v R* [2014] NZCA 219.

¹¹ At [32].

¹² *Nottingham* (Paul Davison J), above n 2, at [136].

¹³ Senior Courts Act 2016, s 71.

of jurisdiction provided under that Act. As to this, we note that s 213 to which we have already referred provides that an appeal court's decision to give or refuse leave is final unless otherwise expressly provided for. This provision is as applicable to the Supreme Court as it is to the Court of Appeal and makes it clear that we do not have jurisdiction to entertain appeals against decisions of the Court of Appeal to refuse leave.¹⁴ We add that the applicant does not meet the criteria for leap frog appeals.

[11] The application for leave to appeal is dismissed. The applicant is to pay the respondents costs of \$2,500.

Solicitors:
Foy & Halse, Auckland for Respondents

¹⁴ *Lihou v R* [2015] NZSC 161; *Gorgus v R* [2016] NZSC 161; *Brown v New Zealand Police* [2017] NZSC 121; and *Pese v R* [2017] NZSC 77. In his written submissions to this Court, the applicant cited several decisions of the Supreme Court of Appeal of South Africa to the effect that a decision of the High Court refusing to leave to appeal is susceptible to appeal to the Supreme Court of Appeal with the special leave of that Court. However, those decisions are particular to their statutory context.