IN THE SUPREME COURT OF NEW ZEALAND

SC 30 & 32/2005
[2005] NZSC 50

M AND F

v

THE QUEEN

Court: Gault J and Tipping J

Counsel: K N Hampton QC for M
P H B Hall for F
B J Horsley and M D Downs for Crown

Judgment: 27 July 2005

JUDGMENT OF THE COURT

The applications for leave to appeal are dismissed.

REASONS

[1] We find it convenient to deal with these two leave applications together as they involve the same point. An oral hearing is not necessary. The applicants are charged with a number of sexual offences said to have occurred between 1968 and 1977. They applied to the High Court for a discharge pursuant to s 347 of the Crimes Act 1961 or alternatively for an order to the effect that all the evidence against them was "inadmissible" on the grounds of delay, abuse of process and the

risk they could not have a fair trial. Severance issues arose if the head applications failed.

[2] The applications were made under s 347 and ostensibly under s 344A of the Crimes Act. John Hansen J treated them as being effectively for the same relief; a discharge or a permanent stay. Save in the case of one complainant, the Judge dismissed the applications.

[3] The applicants then sought to appeal to the Court of Appeal pursuant to s 379A(1)(aa) of the Crimes Act. That appeal was adjourned sine die following the delivery by the Court of Appeal of its decision in *R v Bailey*.[1] In that case the Court held that s 379A confers no jurisdiction to appeal an order made in the High Court, the effect of which is to refuse to grant or to grant a stay, or indeed a discharge, regardless of the precise form in which the relevant application may have been couched. The applicants now seek to appeal out of time directly from the High Court to this Court. They contend that the leapfrog procedure is justified because they wish to challenge the correctness of the decision of the Court of Appeal in *Bailey* which, if it be correct, stands directly in their way. We consider there is a fundamental problem with the application.

[4] Section 379A carefully defines the circumstances in which the Court of Appeal may give leave to appeal from a pre-trial ruling made in the trial Court. There is no general right of appeal in such cases nor indeed is there any general right to seek leave to appeal from a pre-trial ruling. One of the defined circumstances in which the Court of Appeal may give leave in a pre-trial case concerns the making or refusing by the trial Court of an order under s 344A. That section is concerned with the admissibility of "any particular evidence". Section 344A(4) makes it clear that a pre-trial order or ruling of the Judge under the section can be revisited at trial. That circumstance is of some relevance to what the section means by admissibility.

[5] In the present case, irrespective of how the applications to the High Court may have been framed, they were not in substance concerned with the admissibility (either at law or as a matter of discretion) of any particular evidence. The clear

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1 CA46/05, 23 May 2005.

purpose of the applications was to prevent any evidence from being led against the appellants. That purpose was not focused on the legal or discretionary admissibility of the evidence or any particular part of the evidence. In short, the application did not concern the admissibility of evidence in any ordinary sense. In substance the issue raised went to abuse of process and fair trial considerations. It was in that context that the High Court Judge declined the relief sought, save in the case of one complainant. We do not consider that the substance of the applications in the High Court concerned admissibility of evidence as that phrase ought to be construed for the purposes of s 344A.

[6] It follows that there is no basis in law for an appeal to be brought directly to this Court from the High Court orders. This Court lacks jurisdiction to consider the proposed pre-trial appeal for want of qualifying subject matter. The proposed appeal is not authorised by s 379A(1)(aa) of the Crimes Act. Nor is it authorised by any other statutory provision. This Court has power to hear a criminal appeal only if the appeal is authorised by any of the provisions set out in s 10 of the Supreme Court Act 2003. Once it has been determined that s 379A does not authorise the appeal, there is no other empowering provision in Part 13 of the Crimes Act which gives the necessary jurisdiction. In jurisdictional terms the position is the same as that which prevailed in *R v Livingston*.[2]

[7] The applications for leave to appeal are accordingly dismissed in each case. Any outstanding severance issues can appropriately be dealt with in the Court of Appeal.

Solicitors:
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2 [2001] 1 NZLR 167, 175 (CA).