IN THE SUPREME COURT OF NEW ZEALAND

SC CRI 20/2004
[2005] NZSC 23

THOMAS MAXWELL CLARK

v

THE QUEEN

Hearing: 6 April 2005

Court: Elias CJ, Gault, Keith, Blanchard and Tipping JJ

Counsel: C B Cato and A J Guest for Applicant
N M Crutchley for Respondent

Judgment: 10 May 2005

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

(Given by Elias CJ)

The issue

[1] The short point for determination is whether the Supreme Court can give leave to hear a second appeal from a pre-trial ruling as to the admissibility of evidence at trial. Pre-trial appeal is provided for under s 379A of the Crimes Act 1961 "in certain cases". As relevant to the present application, concerned with the appeal of orders for admission of evidence at trial under s 344A, s 379A provides:

379A Right of appeal in certain cases

(1) At any time before the trial … either the prosecutor or the accused person, with the leave of the *court appealed to, may appeal to the Court of Appeal or the Supreme Court* against any of the following orders …, namely,

…

(aa) Against the making of an order under section 344A of this Act, or against the refusal of a Judge to make such an order….

The words italicised were inserted by Part 2 of Schedule 1 of the Supreme Court Act 2003. Until enactment of the Supreme Court Act, s 379A permitted pre-trial appeals only to the Court of Appeal. Counsel referred to the fact that, at least on one occasion,[1] a petition for special leave to appeal a pre-trial ruling was considered by the Judicial Committee of the Privy Council But such petition was to the Queen under the general provisions of s 3 of the Judicial Committee Act 1833.[2] It was not a right of appeal. The advice of the Privy Council on such petitions is taken by the monarch and does not rest on any statutory appeal entitlement. The Supreme Court has no equivalent advisory role. Its jurisdiction is wholly statutory. The question raised by the present application is whether s 379A, as now amended, permits two consecutive appeals (to the Court of Appeal and then to the Supreme Court) or only one appeal (either to the Court of Appeal or to the Supreme Court).

[2] Leave of the Supreme Court is required for all appeals to the Court.[3] Section 12(2) of the Supreme Court Act provides:

(2) References in enactments other than this Act to the leave of the Supreme Court must be read subject to sections 13 and 14.

It is therefore clear that any appeal to the Supreme Court permitted by s 379A must satisfy the leave criteria under s 13 and one that is a direct appeal from a court other than the Court of Appeal will be granted leave under s 14 only if the Supreme Court is "satisfied that there are exceptional circumstances that justify taking the proposed

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1 When leave to appeal against the decision of the Court of Appeal in *R v Grayson and Taylor* [1997] 1 NZLR 399 was declined (29 July 1997).

2 In force in New Zealand by virtue of the Imperial Laws Application Act 1988.

3 Supreme Court Act s 12(1).

appeal directly to the Supreme Court". If s 379A provides for one appeal only, either to the Court of Appeal or to the Supreme Court, then such appeals to the Supreme Court will be available only in "exceptional circumstances".

Background

[3] Appellate jurisdiction is statutory. Those convicted of indictable offences have been able to appeal against conviction or sentence under New Zealand legislation since 1947.[4] At first, appeals could be brought only with leave of the Court of Appeal. Since 1991 such appeals have been available as of right under s 383 of the Crimes Act 1961.[5] The Crown has no equivalent right of appeal from a verdict, but since 1966 the Solicitor-General has been able to appeal, with the leave of the Court of Appeal, against any sentence following conviction on indictment.[6] In addition, by reserving a question of law at trial under s 380, the Crown or the accused has been able to obtain a determination of the point by the Court of Appeal after trial. It was not until 1967, by the Crimes Amendment Act 1966, that the prosecutor or the accused person obtained the ability to take an appeal to the Court of Appeal on a pre-trial ruling before verdict.[7] In 1980 s 344A was enacted, giving a prosecutor or the accused the right to apply to a Judge for a pre-trial ruling as to the admissibility of any evidence.[8] An amendment to s 379A at the same time provided an opportunity to appeal such rulings before the trial.[9] The New Zealand appellate jurisdiction in respect of pre-trial determinations is unusual in its breadth. There is no directly equivalent interlocutory criminal appellate jurisdiction in the United Kingdom, Australia, or Canada.[10]

[4] The applicant is charged with two counts of sexual violation in respect of two complainants. He sought leave under s 379A to appeal to the Court of Appeal from

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4 Criminal Appeal Act 1945 s 3; Crimes Act 1961 s 383(1).
5 Crimes Amendment Act 1991 s 2.
6 Crimes Amendment Act 1966 s 9(1).
7 Crimes Amendment Act 1966 s 8(3).
8 Crimes Amendment Act 1980 s 3(1).
9 Crime Amendment Act 1980 s 3(2).
10 For the position in the United Kingdom, see generally *Taylor on Appeals* (Sweet and Maxwell, London, 2000); for Australia, see *Halsbury's Laws of Australia* vol 9, para [130-13970]; in Canada, Part XXI of the Canadian Criminal Code excludes all pre-trial appeals except an appeal in respect of stay, where of course there is no prospect of an appeal after trial.

two pre-trial rulings of the District Court. In the first ruling, on 8 March 2004, Judge Tompkins granted an application by the prosecution for leave to call certain evidence. In the second ruling, on 4 August 2004, Judge Lance declined to sever the trial of the two counts and ruled that the evidence of each of the complainants was relevant in respect of each charge. The Court of Appeal granted leave to appeal the rulings. By its judgment of 6 December 2004, it allowed the appeal against the ruling of 8 March 2004, but dismissed the appeal against the ruling of 4 August 2004.

[5] The applicant seeks leave to appeal to this Court against the decision of the Court of Appeal upholding the District Court ruling of 4 August 2004. The application for leave was set down for oral hearing, with the indication that the Court wished to hear argument on a preliminary question as to its jurisdiction to entertain the application for leave.

Submissions

[6] Counsel for both applicant and respondent support an interpretation of s 379A which permits the Supreme Court to consider second appeals, following Court of Appeal decisions under s 379A. They point to the purpose of s 3(1)(a)(iii) of the Supreme Court Act in improving access to justice and submit that it is not consistent with that purpose for the only jurisdiction of the Supreme Court in pre trial applications to be through direct appeal under s 14 of the Supreme Court Act. They say the leave requirements of s 13 of the Supreme Court Act ensure that leave will be obtained only where there is a point of principle at stake which merits second-tier appeal. It is argued that there is therefore no sensible policy in depriving the Supreme Court of the assistance of a considered judgment of the Court of Appeal or in limiting the ability to appeal pre-trial to one appeal only (as would be the case if s 379A provides for single direct appeal only). It is argued that the legislation should be construed to make the appeal provisions in respect of pre-trial rulings consistent with those provided for after conviction under ss 383 and 383A of the Crimes Act. Although a limitation to one pre-trial appeal would not preclude the point being taken to the Supreme Court by the accused with leave following

conviction, the Crown has no right of appeal after an acquittal or after the overturning of conviction on appeal. Ms Crutchley submits that it would be convenient for the Crown to be able to take important points of principle on further appeal to the Supreme Court before trial if the Crown is dissatisfied with a determination of the Court of Appeal. Mr Cato, for the applicant, suggests that an interpretation which requires the applicant to choose whether to apply in the Court of Appeal or the Supreme Court could lead to the unfortunate consequence that an applicant who failed to overcome the high hurdle provided by s 14 would be out of time in an application to the Court of Appeal. Both applicant and Crown therefore contend that s 379A simply adds an additional appeal tier which can be used by any party disappointed by the result in the Court of Appeal. Section 13 is said to provide sufficient protection against unmeritorious second appeals.

Decision

[7] We consider that it is clear from the legislative scheme that the contentions put in argument are not sound and that s 379A provides one choice, not two. The changes to s 379A of the Crimes Act introduced by the Supreme Court Act are mirrored in respect of the rights of appeal after conviction under s 383 (with the changes italicised):

> **383 Right of appeal against conviction or sentence**
>
> (1) Any person convicted on indictment may appeal to the Court of Appeal *or, with the leave of the Supreme Court, to the Supreme Court* against-
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> (a) The conviction; or
>
> (b) The sentence passed on the conviction (unless the sentence is one fixed by law); or
>
> (c) Both.
>
> (2) The Solicitor-General, with the leave of the *court appealed to, may appeal to the Court of Appeal or the Supreme Court* against the sentence passed on the conviction of any person on indictment, unless the sentence is one fixed by law.
>
> …

[8] What is contemplated by s 383 is not two consecutive appeals but the possibility of an appeal to the Supreme Court by-passing or "leap-frogging" the Court of Appeal. That is made clear by s 383A, also inserted by the Supreme Court Act. Section 383A provides distinctly for a second appeal from a decision of the Court of Appeal on appeal under s 383. If the argument addressed to us on the interpretation of s 379A is correct, it would be equally valid for s 383. On that interpretation of s 383, s 383A would be wholly unnecessary. Section 383A provides:

> **383A Appeal against decision of Court of Appeal on appeal against conviction or sentence**
>
> (1) With the leave of the Supreme Court, a convicted person may appeal to the Supreme Court against a decision of the Court of Appeal on appeal under section 383.
>
> (2) With the leave of the Supreme Court, the Solicitor-General may appeal to the Supreme Court against a decision of the Court of Appeal on appeal under section 383(2).
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> ….

[9] The legislation provides for both pre-trial and post-conviction appeals by leap-frog to the Supreme Court (as is envisaged by s 14 of the Supreme Court Act in exceptional circumstances) and for appeal to the Court of Appeal where leap-frog is not sought. In the case of pre-trial appeals or Solicitor-General appeals against sentence (where there is no appeal as of right), leave must be sought from "the Court appealed to." In the case of conviction or sentence appeals by a convicted person, no leave is necessary for appeal to the Court of Appeal. If leap-frog appeal after conviction is sought (without going first to the Court of Appeal as of right), the leave of the Supreme Court is however required. There is no right of second appeal from a decision of the Court of Appeal on appeal under s 383. Instead, s 383A distinctly provides for second appeal to the Supreme Court with its leave.

[10] The same scheme is adopted in respect of other amendments contained in Schedule 1 of the Supreme Court Act. They include amendments to the Courts Martial Appeals Act 1953 (providing for appeals from the Courts Martial Appeal Court), a new s 406A of the Crimes Act (providing for appeals on references determined by the High Court), a new s 144A of the Summary Proceedings Act 1957

(providing for appeals from determinations of the High Court on case stated or appeals from the District Court in "exceptional circumstances"), a new s 155 of the Animal Products Act 1999 (providing for appeals from determinations of the High Court on appeal), and a new s 214A of the Employment Relations Act 2000 (providing for appeals from the Employment Court). Whenever provision is made for a direct appeal to the Supreme Court, it is an exceptional leapfrog of the Court of Appeal, not a procedure to be resorted to following a Court of Appeal determination.

[11] We are unable to agree with the policy arguments addressed to us by counsel to suggest that the clear statutory scheme was not intended. There are good reasons why the legislature should provide for one appeal only for pre-trial rulings despite the possibility of two appeals after conviction under s 383A. As indicated, the New Zealand opportunity for pre-trial appeal of evidence rulings is unusual. The requirement of leave, not imposed on the convicted person after trial under s 383 for appeal to the Court of Appeal, recognises that there are competing interests to be considered. Delay to trial, with the attendant strain on complainants and witnesses, is one important consideration. Someone convicted after an adverse pre-trial ruling in the Court of Appeal may take the point again on appeal after conviction and may have a basis for a leap-frog appeal under s 383. The Crown's inability to appeal following trial or following the overturning of a conviction by the Court of Appeal, is a general disability which follows from the nature of the criminal process and does not suggest that a new appeal opportunity needs to be created pre-trial. It is unlikely that an applicant who fails to convince the Supreme Court that the circumstances are exceptional under s 14 would be denied an opportunity to test the ruling for correctness in the Court of Appeal because he or she chose to apply first in the Supreme Court.

[12] The amendments introduced by the Supreme Court Act to s 379A and ss 383-383A are carefully constructed. Section 379A, properly construed, does not permit a second appeal to the Supreme Court from a pre-trial determination of the Court of Appeal. The Supreme Court has no jurisdiction to give leave for such an appeal. It follows that the application must be dismissed.

Solicitors:
Crown Law Office, Wellington