IN THE SUPREME COURT OF NEW ZEALAND

SC 103/2009
[2010] NZSC 105

PETER MORRISON PETRYSZICK

v

THE QUEEN

Hearing:	23 July 2010
Court:	Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ
Counsel:	Appellant in person D B Collins QC, Solicitor-General, C J Curran and P D Marshall for Crown G J King as Amicus Curiae
Judgment:	24 August 2010

JUDGMENT OF THE COURT

A The appeal is allowed and the order made by the Court of Appeal set aside.

B The appellant's appeal against his conviction is remitted to the Court of Appeal for determination in accordance with s 385(1) of the Crimes Act 1961.

REASONS

(Given by Elias CJ)

[1] Peter Morrison Petryszick, who had been convicted on indictment of assault using a vehicle as a weapon,[1] appealed against his conviction to the Court of Appeal. His appeal required determination in accordance with the provisions of the New Zealand Bill of Rights Act 1990 and the Crimes Act 1961. As a "minimum standard of criminal procedure",[2] everyone convicted of an offence has the right under s 25(h) of the New Zealand Bill of Rights Act "to appeal according to law to a higher court". Section 25(h) is based upon article 14(5) of the International Covenant on Civil and Political Rights which provides that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". In New Zealand, this minimum standard is fulfilled for those convicted on indictment by s 383 of the Crimes Act. It permits any person convicted on indictment to appeal to the Court of Appeal. Section 388 requires notice of appeal to be given "in such manner as may be directed by rules of court within 28 days after the date of conviction" or, if the person convicted is sentenced at a later date, "not later than 28 days after the date of sentence". The "rules of court" referred to are defined as those made under s 409 of the Crimes Act and s 51C of the Judicature Act 1908.[3] Once an appeal is properly brought in accordance with ss 383 and 388, it must be determined under s 385 of the Crimes Act, except in the special cases provided for by the legislation. None of the special cases applied to Mr Petryszick's appeal. It required determination by the Court of Appeal in accordance with s 385.

[2] Under s 385(1)[4] the Court of Appeal must allow an appeal if it is of the opinion that one of four grounds specified is made out, unless it considers that no substantial miscarriage of justice has actually occurred (in application of the proviso to s 385(1)). If not of the opinion that one of the four grounds is made out, the Court must dismiss the appeal. The terms and scheme of s 385(1) require the Court to

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1 Crimes Act 1961, s 202C(1)(a).

2 As the rights contained in it are described in the heading to s 25 of the New Zealand Bill of Rights Act 1990.

3 Crimes Act 1961, s 379.

4 Set out at [17].

determine the substance of each appeal on its merits, as is consistent with s 25(h) of the New Zealand Bill of Rights Act and article 14(5) of the International Covenant on Civil and Political Rights. Referring to the human rights context, the Privy Council said of the right of appeal contained in s 383 of the Crimes Act that it is "intended to be an effective right of appeal which so far as is reasonably possible will ensure that justice is done in the appeal process".[5]

> The context is one of access to justice and it calls for what Lord Wilberforce in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 at 328, described as "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism.'" The substance must match the form.

[3] The issue on appeal is whether Mr Petryszick was denied an effective appeal against conviction, as required by s 25(h) of the New Zealand Bill of Rights Act and in accordance with ss 383 and 385 of the Crimes Act by reason of the Court of Appeal's dismissal of his appeal on procedural grounds. For the reasons that follow, we are of the view that he was denied that right and that his appeal must be reheard.

The decision of the Court of Appeal to dismiss the appeal

[4] Mr Petryszick's appeal was dismissed by the Court of Appeal in a judgment of 27 October 2009 following hearing on 15 October 2009.[6] Before then, the appeal had been "dogged by delay",[7] all of which the Court attributed with some justification to Mr Petryszick. Mr Petryszick was in custody at the time of the hearing and had been for much of the period since filing his notice of appeal in April 2008 (a circumstance which he points to in explanation for his delay in obtaining counsel and in filing written submissions). By 15 October, which was the date fixed in mid-July for hearing the appeal, Mr Petryszick had not filed written submissions in support of the appeal, in breach of r 27 of the Court of Appeal

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5 *R v Taito* [2002] UKPC 15, [2003] 3 NZLR 577 at [12].
6 *R v Petryszick* [2009] NZCA 515 per Chambers, Potter, and Wild JJ.
7 At [1].

(Criminal Rules) 2001[8] and despite directions and reminders from the Court. His earlier attempts to obtain legal representation, on an indication that legal aid could be available, had been unsuccessful. A late application resulted in a limited grant of legal aid in mid-September 2009, to enable the Legal Services Agency to assess whether legal aid for the appeal was warranted. The assessment had not been completed by assigned counsel at the date of the hearing on 15 October.

[5] Mr Petryszick did not appear at the Court of Appeal on the date fixed for hearing of the appeal. He was in prison at the time. Nor was there an appearance by the counsel who had been assigned for the purposes of the limited legal aid assessment, although he arranged for a junior, Mr Soondram, to appear. Mr Soondram advised the Court that he and assigned counsel had "so far" been able to identify only two grounds warranting further inquiry. The Court noted that "[e]ven though in terms of this court's earlier orders Mr Petryszick had no right to be heard on the appeal",[9] it had invited Mr Soondram to identify the two points, so that the Court could consider whether they warranted a further adjournment. They were the claim of improper influence of the jury alleged against the trial court Registrar, and the claim that a search warrant in respect of Mr Petryszick's phone records was invalid and evidence obtained under it wrongly admitted.

[6] The Court declined the application for adjournment made by Mr Soondram for reasons given in its judgment of 27 October also dismissing the appeal. The adjournment was refused on the basis that neither point identified by counsel as warranting investigation appeared to have merit. The allegation against the Registrar was said by Mr Soondram to be based on something overheard by a witness. Mr Soondram did not know the name of the witness or what the witness would say. With "no more detail than that", the Court of Appeal said "we cannot judge the merit of this allegation".[10] The challenge to the warrant was also said by the Court to have no merit: the application for search warrant appeared to be in proper form; and the

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8 **27 Timing of submissions on merits**
(1) This rule applies to oral appeals.
(2) The appellant must provide full written submissions on the appeal.
(3) The appellant must provide his or her written submissions to the court and to the respondent no less than 15 working days before the hearing date. ...

9 At [5], in apparent reference to the direction made on 30 June 2009, set out below at [11].

10 At [6].

information obtained (as to phone records) was clearly relevant to Mr Petryszick's explanation of the events, the subject of the charge. The Court accordingly declined the adjournment.

[7] In dismissing the appeal, the Court of Appeal recorded that, on refusal of the adjournment, Mr Soondram advised that he was not in a position to advance any further argument to the Court on the appeal. The decision of the Court, dismissing the appeal, followed:

> [9] It is time this long-running appeal was brought to an end. We dismiss the appeal.
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> [10] If Mr Petryszick feels he has not been heard on the appeal, he has only himself to blame. This court has bent over backwards to get this appeal ready for hearing and to urge Mr Petryszick to apply for legal aid so that a lawyer could properly analyse whether he had any legitimate grounds of appeal. Instead, he has chosen to run a meritless campaign alleging a massive conspiracy involving the police, the Crown Solicitor in Whangarei, court staff, the legal profession, and the judiciary.

Procedural background to the decision

[8] Mr Petryszick was convicted on 21 November 2007 and sentenced on 3 April 2008. He appealed to the Court of Appeal against the conviction within 28 days of sentence, as s 388 requires, raising a number of grounds of appeal. But the notice was informal, because not in the form prescribed by r 6 of the Court of Appeal (Criminal) Rules 2001. A second notice in the prescribed form was accepted by the Court of Appeal after an order extending time for its filing was made by a Judge of the Court on 8 July 2008.[11]

[9] Ten principal grounds of appeal were raised by the appellant in his original, non-complying, notice and incorporated by reference in the subsequent notice complying with r 6. They included claims that the verdict of the jury was not supported by the evidence, that evidence of Mr Petryszick's mobile phone records was obtained through invalid search warrant, that the inadequacy of defence counsel prevented the defence being properly put, that the prosecutor had misconducted the

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[11] Minute of Ellen France J, Court of Appeal (8 July 2008).

trial, that the trial Judge had misdirected the jury, and that a court official had improperly influenced the jury.

[10] Between the filing of the appeal and its eventual dismissal on 27 October 2009, fixtures for its hearing had been made for 28 August 2008, 25 November 2008, 11 May 2009, and 30 June 2009. All had been adjourned at the request of the appellant (that of 30 June 2009 at the hearing, the others before the dates of the fixtures were reached). The adjournments of the earlier fixtures were sought for a variety of reasons, including the appellant's requests for trial transcripts and other material, uncertainty about whether he would be legally represented or not (legal aid had been indicated to be available but was not obtained by the appellant until a very late stage in the sequence, and then on a limited basis only), and the appellant's request to have the appeal deferred until he was released from prison. The course of the appeal was also punctuated by attempts by the Court to obtain the appellant's written submissions in advance of the fixtures, in accordance with r 27 of the Court of Appeal (Criminal) Rules 2001.

[11] A Minute of 14 November 2008 indicated that the appeal was to proceed in the new year and it was later set down for hearing on 30 June 2009. At the hearing on 30 June 2009, however, Mr Petryszick continued to maintain that he did not have material he had requested and to which he wished to refer. He had not filed written submissions. No application for leave to adduce further evidence had been filed, although it was apparent that Mr Petryszick wished to put further material before the Court. Although considering that the position was "thoroughly unsatisfactory", the Court granted a further adjournment on 30 June 2009 with a number of directions:[12]

> (a) Mr Petryszick is, within one month from today's date, 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.
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> (b) If Mr Petryszick is to be represented by counsel then the name of that counsel is to be notified to the Registrar of the Court of Appeal and to the Crown within 14 days of today's date. Again, this is an unless order. That is, unless that is done counsel will not be heard on the appeal itself. This is an unusual order but it

[12] Minute of the Court of Appeal, Hammond, Keane and Simon France JJ (30 June 2009).

> is necessary because Mr Petryszick has blown hot and cold on whether he will have counsel. He has then sought to use that to avoid getting on with the appeal. If Mr Petryszick wishes to extend this 14 day period for appointing a lawyer, he must make formal application setting out reasons in support.
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> (c) In the event that Mr Petryszick considers any further evidence should be before the Court then a formal application to that effect is to be made within 14 days of today's date, supported by affidavits. The application is to be served on the Crown within 21 days of today's date. That application could possibly be determined by the Court prior to the appeal coming on for hearing again, depending on the nature of it.
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> (d) In her Minute of 20 June 2008, Glazebrook J drew Mr Petryszick's attention to the requirements of r 12A if there is to be a challenge to counsel competence at the original hearing. Mr Petryszick has told us today that he intends to pursue that line of appeal. He must strictly comply with r 12A,[13] again as an unless order.
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> Because of the delay which has occurred in this matter, although it is for the Registrar of the Court of Appeal, it is highly desirable that a fixture date be fixed fairly well in advance for this matter so that it cannot again be said that Mr Petryszick has not had every opportunity to address the matters which he says need to be dealt with. This is his last chance.

[12] On 12 July Mr Petryszick applied for an exemption from the application of r 12A(2)(a) (as to waiver of privilege) and made application for leave to call further evidence. He also made a number of applications including for production of the audio record of a 111 call made by the complainant, for the recording of his trial (in respect of which a transcript only had been provided), and for extension of time for the hearing of the appeal, to enable him to obtain a lawyer. These applications were received by the Court on 13 July. The Court's letter of 14 July advising Mr Petryszick that his appeal was set down for hearing on 15 October in Auckland, with submissions due on 30 July (in accordance with the Court's Minute of 30 June), made no reference however to Mr Petryszick's new applications.

[13] There were difficulties in communicating with Mr Petryszick, particularly as to his obtaining legal aid. They were exacerbated by his being again in custody from 30 July, and by the fact that correspondence from the Court was sent to the wrong address and its delivery delayed. That correspondence included legal aid forms

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[13] Rule 12A, requiring waiver of privilege in cases where trial counsel competence is a ground of the appeal, is discussed below at [20].

which Mr Petryszick had requested to enable him to obtain legal representation. On 3 September Mr Petryszick was sent a letter by the Court reminding him of the date of hearing on 15 October and advising that his submissions had been due on 30 July. The letter was in standard form. It did not refer to the "unless" orders made on 30 June. Nor did it did refer to the applications made by Mr Petryszick for adjournment, to call additional evidence, for exemption from the r 12A waiver of privilege, and for disclosure of recordings of the trial and 111 call. It was not until 7 September that the legal aid forms were sent to the correct address.

[14] A Minute of the Court, also on 7 September, acknowledged the advice received that Mr Petryszick wished to instruct a lawyer and advised that the applications he had made on 12 July would be dealt with by the Court at the hearing on 15 October.[14] It urged him to instruct a lawyer urgently and extended the time for the filing of submissions earlier set in the Minute of the Court of 30 June. In the meantime, the Court made inquiries of the District Court about the additional material from the trial requested by Mr Petryszick, ascertaining that the District Court could provide an audio recording of the trial (later provided to the Court on 11 September), but not the 111 call.

[15] On 16 September the Legal Services Agency confirmed that it had granted limited legal aid to Mr Petryszick to permit counsel to prepare a summary of issues, so that grant of legal aid for the appeal could be considered by the Agency. A letter from the Court sent on 22 September to counsel assigned did not refer to the fixture date of 15 October (which had earlier been notified to Mr Peytrszick by letter of 14 July 2009), but indicated to counsel that the Court fixtures manager "will be in contact with you in due course to arrange a hearing date". On 13 October the Legal Services Agency, on receiving an interim report from assigned counsel, confirmed a further limited grant of legal aid for the purposes of providing a full summary of issues on the grounds of appeal. This summary, not surprisingly, had not been provided to the Legal Services Agency by the time of the scheduled hearing on 15 October. As a result, legal aid for the appeal had not yet been granted.

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[14] Minute of Glazebrook J, Court of Appeal (7 September 2009).

[16] That is where matters stood at the date of the fixture on 15 October. Counsel instructed, Mr Comesky, had not yet undertaken the summary of issues required by the Legal Services Agency before it would consider the application for legal aid for the purposes of the appeal. Mr Petryszick was still in custody. His applications, including for dispensation from the requirement of waiver of privilege and for extension of time, to enable counsel to be instructed, were outstanding and had been directed to be considered at the hearing on 15 October. Mr Comesky was not available to appear at the hearing on 15 October (a matter that is not surprising given that he was not yet confirmed to appear on the appeal and was simply assessing its prospects for the purposes of the Legal Services Agency), but sent Mr Soondram to apply for an adjournment. The adjournment application was declined, for the reasons later given in the judgment of 27 October. The outstanding applications made by Mr Petryszick were not separately considered. Nor was there separate consideration of whether his failure to file written submissions was "wilful" in the context of his further unresolved applications.[15] Mr Petryszick's appeal was dismissed for the reasons given in the judgment of 27 October, set out in full as material to the dismissal at [7] above.

The legislation

[17] As has already been outlined, s 383 of the Crimes Act sets out a general right of appeal by which "[a]ny person convicted on indictment may appeal to the Court of Appeal ... against ... the conviction". Section 385 provides for how appeals are to be determined in "ordinary cases", that is to say cases not falling within the special circumstances provided for in the legislation (none of which apply here). Section 385(1AA) makes it clear that s 385 applies to all appeals to the Court of Appeal. Subsection (1) is the provision principally in issue in the present appeal:

> (1) On any appeal to which subsection (1AA) applies, the Court of Appeal ... must allow the appeal if it is of opinion–
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> (a) that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or

[15] See r 44 of the Court of Appeal (Criminal) Rules 2001 (at [21] below).

> (b) that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
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> (c) that on any ground there was a miscarriage of justice; or
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> (d) that the trial was a nullity–
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> and in any other case shall dismiss the appeal:
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> provided that the Court of Appeal ... may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

[18] In order that the Court of Appeal may carry out its responsibilities, the Registrar of the Court is obliged by s 392(1) of the Crimes Act to "obtain and lay before the Court in proper form all documents, exhibits, and other things connected with the proceedings in the Court whose decision is appealed against which appear necessary for the proper determination of the appeal or application". In particular, the Registrar is obliged by s 392(1A) to prepare a preliminary case on appeal comprising the trial transcript and the Judge's summing up (if relevant to the grounds of appeal) as well as other documents or exhibits relevant to the grounds of appeal and appropriate for inclusion. The Court itself has "supplemental powers" under s 389, where it thinks it "necessary or expedient in the interests of justice", to obtain further information or evidence for the purposes of any appeal.

[19] Under s 392A of the Crimes Act, appeals must be dealt with "by way of a hearing involving oral submissions" unless the Court or a Judge determines that the appeal can fairly be dealt with on the papers and the result (whether the appeal must be dismissed or allowed) is clear. There was no determination by the Court that Mr Petryszick's appeal be dealt with on the papers. It accordingly fell to be decided following a hearing involving oral submissions.

[20] The Court of Appeal (Criminal) Rules 2001, made under the authority of s 409 of the Crimes Act and s 51C of the Judicature Act 1908, regulate the practice and procedure of the Court of Appeal on appeals. Rule 12A provides that if a ground of appeal is based on the conduct of the appellant's counsel at trial, the appellant must provide a written waiver of privilege unless he applies for

exemption.[16] This rule was the basis of the "unless" order made on 30 June 2009 and the appellant's subsequent application for exemption. Rule 12B, also the basis of an application by Mr Petryszick, governs notice about leave to call fresh evidence. Rules 26 to 28 deal with oral appeals. Rule 27 requires the appellant in an oral appeal to "provide full written submissions on the appeal" no less than 15 working days before the hearing date. The appellant did not comply with this rule before the hearing on 15 October. Rule 35 deals with the manner in which an appeal may be abandoned by an appellant. There is no question of any such abandonment by Mr Petryszick. On the contrary, he continued to assert his right to appeal throughout.

[21] Rule 44 provides for the "effect of non-compliance with rules":

> **44 Effect of non-compliance with rules**
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> (1) Non-compliance by a party with these rules does not prevent that party from continuing to take part in the appeal if the Court considers that the non-compliance was not wilful and that it may be waived or remedied by amendment or otherwise.
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> (2) The Court may, in any manner that it thinks fit,–
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> (a) direct the party to remedy the non-compliance; and
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> (b) if the party was not present in court when the direction was given, direct the Registrar to transmit its direction to the party.

[22] More generally, the Court has power under r 43 to enforce by order any duty imposed on any person under Part 13 of the Crimes Act (dealing with appeals) or the Rules. And under r 45, in any matter not provided for by the Rules, the Court may "give any direction that it thinks best calculated to carry out the purposes of Part 13 of the Act ...".

The refusal of adjournment

[23] The reasons given by the Court in declining the adjournment sought at the hearing on 15 October do not address the difficulties Mr Petryszick was under as an

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[16] From 1 September 2010 such waiver will no longer be mandatory under r 12A: Court of Appeal (Criminal) Amendment Rules 2010, r 4.

unrepresented appellant in custody for much of the period of delay. The applications he made during that period, some of which remained outstanding at 15 October, indicate engagement with the appeal process and attempts to comply with the requirements of the Rules. Until he had obtained the material he sought and had ascertained whether he could obtain legal representation, the provision of written submissions would be difficult. Counsel appearing at the hearing was clearly not in a position to give the background and Mr Petryszick himself was not present to explain his position. The more recent messages from the Court had been mixed as to whether the date would be treated as final.

[24] Nowhere in the communications from the Court following receipt of Mr Petryszick's applications (which included an application for further time to obtain representation) and the notification of assignment of counsel (who was, misleadingly, advised that a date of hearing would be notified to him in due course) was there clear advice that the Court would proceed to determine the appeal on 15 October, on the materials then before it. Nor did the Court consider whether the very recent limited grant of legal aid and the engagement of counsel for Mr Petryszick offered the prospect that matters were at last on track and should be allowed to proceed.

[25] We are left uneasy about whether the interests of justice were served by denying the application for adjournment, even at such a late stage. It is however unnecessary to express any concluded view on the appropriateness of the course followed as to adjournment because it is overtaken by the view we take as to the basis on which the substantive appeal was dismissed.

No jurisdiction to dismiss appeal for non-compliance with the rules

[26] The appeal was properly constituted when the Court granted Mr Petryszick an extension of time to bring it in the prescribed form. It was not abandoned by Mr Petryszick. On 15 October 2009 he was, however, in default as to compliance with directions of the Court, and had failed to comply with rr 27 (as to the provision of written submissions) and 12A (waiver of privilege). He was unprepared for the hearing of the appeal on 15 October and sought its further adjournment, despite the

previous adjournments and the indications of the Court that he would be granted no more. Did these defaults justify the Court of Appeal's dismissal of the appeal without proper consideration of its merits?

[27] The "unless" orders made at the hearing on 30 June 2009 were unusual. It is not clear whether the Court intended to suggest that the appeal would not be entertained at all unless Mr Petryszick complied with the orders. It may not have meant to go so far. Rather, it may have been the Court's intention to indicate that it would invoke its powers under r 44 to prevent further participation by Mr Petryszick. If so, the form of the direction may have exceeded the Court's power because on its face such a course is authorised only if non-compliance is wilful, a matter that could not have been predetermined at 30 June. The point does not need to be further considered, because the directions of 30 June were effectively overtaken by the Minute of 7 September which extended the time for the filing of submissions, urged Mr Petryszick to instruct a lawyer as a matter of urgency, and indicated that his further applications would be heard on 15 October.

[28] Nor is it necessary for the purposes of the appeal to consider whether on 15 October the Court could have been justified in relying on r 44 to prevent Mr Petryszick "continuing to take part in the appeal" because of non-compliance with its directions. The Court did not purport to invoke r 44 and, had it done so, it would have needed to consider whether the non-compliance was "wilful" against a background which included the difficulties in communication experienced by the appellant in custody, the misdirection of correspondence, the mixed messages contained in some of the correspondence, the appellant's continuing attempts to obtain legal representation, and the interests of justice.

[29] The issue for determination on this appeal is rather whether the Court of Appeal had jurisdiction to dismiss the appeal on the basis it expressed: that the appeal was not ready for hearing because of procedural default by Mr Petryszick. Jurisdiction to dismiss an appeal for deficiencies in its prosecution by the appellant is not conferred by the Crimes Act. The Solicitor-General suggested however that an appeal may be dismissed for such reasons either under rr 43 or 45 of the

Court of Appeal (Criminal) Rules 2001[17] or under the inherent or implied authority of the Court to prevent abuse of its process.

[30] Rules to facilitate the "expeditious, inexpensive, and just dispatch of the business of the court, or otherwise assisting in the due administration of justice" are authorised by s 409 of the Crimes Act and s 51C of the Judicature Act, under which the Court of Appeal (Criminal) Rules 2001 were made. The inherent powers of the Court to prevent abuse of its processes are similarly available in an appropriate case where the legislation does not itself provide authority to prevent such abuse. But neither the statutory power to regulate the procedure of the Court by rules nor the inherent ancillary power to prevent abuse can be used to deny the substantive right of appeal conferred by s 383 of the Crimes Act and s 25(h) of the New Zealand Bill of Rights Act. Indeed, the power in r 45 to give directions "in any matter not expressly provided for by these rules" is expressly made subject to the "purposes of Part 13 of the [Crimes] Act".

[31] Although it is not necessary to consider the scope of the powers conferred by rr 43 and 45 in cases where they are properly exercised, it may also be doubted that such general powers could properly be used to expand the limits set by r 44 as to the effect of non-compliance with the rules. The sanction it provides restricts further participation, rather than authorising peremptory dismissal of the appeal. And it is available only for wilful default.

[32] It may be doubted whether such general rule-making authority and the general powers provided under it or the ancillary powers of the Court could ever properly be invoked to restrict the substantive right conferred by s 383, at least without express or implied authority in the primary legislation. There is no express power to dismiss appeals for procedural default. And there can be no implied power to do so because it would plainly be inconsistent with s 385(1) and the scheme of Part 13 of the Act. The provisions of the Act permit dismissal of an appeal only by determination of the Court in the manner envisaged by s 385(1), requiring assessment by the Court of Appeal of whether one of the grounds in the subsection is made out. That interpretation is also compelled by ss 6 and 25(h) of the

[17] The terms of which are set out at [22].

New Zealand Bill of Rights Act. The review provided by s 383 fulfils the minimum standard of process required by s 25(h) of the New Zealand Bill of Rights Act and the international obligation it carries into domestic law. The substance of such right cannot be eroded by subordinate legislation or the exercise of the inherent powers of the Court to control its procedure. Nor can it be undermined by the exercise of general powers under the rules.

[33] Whatever may be the consequence of non-compliance with the rules, they do not displace the responsibility of the Court of Appeal under s 385(1). An appellant in default under the rules may be subject to sanction under r 44, but that does not affect the obligation of the Court of Appeal to decide the appeal in terms of s 385(1). The only basis under the rules upon which determination of an appeal under s 385(1) need not take place is if notice of abandonment is received from the appellant under r 35.[18] Such abandonment by the appellant is not inconsistent with s 385(1) because it simply withdraws the appellant's exercise of the opportunity to appeal under s 383.

[34] The rules and the inherent jurisdiction do not therefore bear on the critical question on which the appeal turns, whether the right to appeal according to law was denied. The answer depends upon whether the Court of Appeal determined Mr Petryszick's appeal in application of s 385(1), as it was obliged to do.

The appeal was not determined in accordance with s 385(1)

[35] The Court may conduct its assessment under s 385(1) either at oral hearing or, if it so directs,[19] in a hearing on the papers. Here, the Court did not order a hearing on the papers (a course that could have been available if the Court considered the s 392A criteria were met). In both cases, consideration will be on the material before the Court at the date of the hearing. The material will include that which the Registrar is obliged to obtain under s 392. In particular, to the extent relevant to the grounds of appeal, the Court will need to consider the transcript of the trial and the Judge's summing up. The Court is not obliged to conduct its own

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[18] Such notice must be provided to the Court in writing and signed by the appellant or his solicitor or counsel: Court of Appeal (Criminal Appeal) Rules 2001, r 35.

[19] Under the Crimes Act 1961, s 392A.

inquiries, unless it considers it "necessary or expedient in the interests of justice" to invoke its supplementary powers under s 389 to obtain further information. The Court may be brief in rejecting grounds of appeal which are clearly unsubstantiated on the material before the Court. But it is necessary for it to demonstrate that it has addressed the substance of the appeal, as s 385(1) requires. There is no basis for rejecting an appeal for procedural reasons.

[36] The appeal in the present case was not determined in the manner required by s 385(1) of the Crimes Act. The Court of Appeal did not purport to address its merits. Although the reasons it gave for refusing the requested adjournment indicate that the Court saw no merit on the material then before it in the two grounds of appeal used to support the application for adjournment, the other grounds referred to in the notice of appeal were not addressed at all by the Court. The basis on which the appeal was dismissed was, rather, that Mr Petryszick's failure to get the appeal "ready for hearing" by filing written submissions and obtaining legal representation justified the Court in declining to consider it further. The appeal was accordingly dismissed on procedural grounds, as the Solicitor-General properly acknowledged.

[37] We consider the basis on which the appeal was dismissed did not discharge the responsibility of the Court of Appeal under s 385(1) of the Crimes Act. Even if the Court was entitled to decline further adjournment and any opportunity for Mr Petryszick to be heard further on his appeal (a matter on which we have expressed some doubt), it was obliged to review the material before it and relevant to the grounds of appeal, including the trial transcript and the Judge's summing up, to determine on the basis set out in s 385(1) whether it must allow or dismiss the appeal. Its failure to do so means that the appellant has been denied his appeal. It must be sent back for rehearing.

Solicitors:
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