IN THE SUPREME COURT OF NEW ZEALAND

SC 106/2010
[2010] NZSC 147

JOHN COLMAN

v

THE POLICE

Court: Elias CJ, McGrath and William Young JJ

Counsel: Applicant in person
S B Edwards for Police

Judgment: 8 December 2010

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was found guilty in the District Court of using insulting language. On his appeal to the High Court, Allan J held the charge had been made out (and dismissed associated challenges to the process followed in the District Court) but discharged the applicant without conviction. Such discharge is deemed to be an acquittal by s 106(2) of the Sentencing Act 2002.

[2] An application by the applicant for special leave to appeal to the Court of Appeal was dismissed by that Court.[1] This was on the basis that given the deemed

1 *Colman v Police* [2010] NZCA 474.

acquittal, there was no jurisdiction to entertain a further appeal. In reaching this conclusion the Court relied on and applied its previous decision in *R v Terry*.[2]

[3] The applicant then applied for leave to appeal to this Court from the decision of the Court of Appeal. There being no right of appeal from that judgment, his application was treated by the Registrar as an application for leave to appeal direct from the High Court judgment under s 144A of the Summary Proceedings Act 1957. The latter section is in these terms:

> **144A Appeal to Supreme Court**
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> (1) With the leave of the Supreme Court, either party may appeal to the Supreme Court against—
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> ...
>
> (b) a determination of the High Court (other than a determination made on an interlocutory application (within the meaning of the Supreme Court Act 2003) made in a general appeal; or
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> ...
>
> (2) Subsection (1) is subject to section 14 of the Supreme Court Act 2003 (which provides that the Supreme Court must not give leave to appeal directly to it against a decision made in a court other than the Court of Appeal unless it is satisfied that there are exceptional circumstances that justify taking the proposed appeal directly to the Supreme Court).

[4] It will be observed that an applicant for leave to appeal must be able to point to "a determination ... made in a general appeal". The corresponding language in s 144 (in relation to appeals to the Court of Appeal) is "any determination of the High Court on a question of law arising in any general appeal". In issue on this application is whether the conclusion of Allan J that the charge had been proved and his rejection of associated procedural challenges, all of which logically preceded his decision to discharge the applicant without conviction, amounted to a "determination" of the kind contemplated by s 144A(1)(b).

[5] The word "determination" is used in a number of the related sections of Summary Proceedings Act, in particular ss 107 (as to appeals by way of case stated)

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2 *R v Terry* [2007] NZCA 455.

and 115 (as to general appeals) and has been the subject of much judicial consideration, as the judgment of Allan J demonstrates.[3]

[6] There are a number of High Court decisions as to whether a defendant who has been discharged without conviction has a right of appeal under s 115 of the Summary Proceedings Act. It is clear that such a defendant has no such right,[4] unless also the subject of an adverse order (which now includes a refusal to order costs). This approach conforms to, and has been largely driven by, the text of s 115. It has, however, also been influenced by the reality that a defendant who has been discharged without conviction is deemed to have been acquitted.[5]

[7] The case stated procedure provided for by s 107 of the Summary Proceedings Act can be invoked by either prosecutor or defendant and is thus expressed in more general terms than s 115. On a number of occasions, this process has been relied on by prosecutors where there have been discharges without conviction. We are, however, not aware of any instances where a defendant who was discharged without conviction and was not otherwise aggrieved by orders made in the District Court has successfully resorted to the case stated process.[6]

[8] If the applicant had been discharged without conviction in the District Court and there had been no other relevant adverse decision, he would not have had a right of appeal to the High Court under s 115. Given that this is effectively what happened in the High Court,[7] it would be rather odd if ss 144 and 144A provided him with the possibility of an appeal to either the Court of Appeal or this Court.

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3 He was required to address challenges by Mr Colman to other decisions made in the District Court and his jurisdiction to do so turned on whether they were relevantly "determinations".

4 The relevant cases are discussed in *R v Police* [1999] 2 NZLR 764 (HC). See also *Raharuhi v Police* HC Rotorua CRI-2008-069-2002, 5 March 2009.

5 See for instance the remarks of Wild CJ in *S v Police* [1968] NZLR 798 (SC) at 800, "Common sense dictates that a person who has the benefit of an acquittal cannot appeal against it."

6 In *Witte v Noxious Weeds Inspector* [1974] 2 NZLR 367 (SC), there were cross appeals by the defendant (against the finding that the charge was proved) and by the prosecutor against the discharge. There was no challenge to the defendant's use of the case stated process but such a challenge would have been pointless as the defendant's argument was in any event available to him on the prosecutor's appeal which, as it turned out was successful.

7 The Judge awarded costs against Mr Colman in relation to unsuccessful challenges to other decisions but made no order for costs in respect of the insulting language conviction appeal. There is no indication in the judgment of Allan J having refused an application for costs by Mr Colman and in any event the application for leave to appeal does not address costs.

[9] More generally, if the courts are to be faithful to the language of s 106 of the Sentencing Act – providing that a discharge against conviction is deemed to be an acquittal – they cannot distinguish between an acquittal on the merits and a discharge without conviction.[8] It follows that if there is a right of appeal in this case, there will likewise be a right of appeal to any person who was completely successful in the High Court (in terms of result) but claims that the High Court erroneously rejected an alternative argument as to why he or she should have won in that Court. Such a broad and free-standing right of appeal would conform neither to the approach generally taken in relation to the word "determination" where it appears in the Summary Proceedings Act[9] nor to general appellate principles under which rights of appeal relate to the orders made by the courts and not to a judge's intermediate reasoning steps.[10]

[10] We are in no doubt that s 144A contemplates an appeal only in relation to determinations on questions of law which are material to a judgment which is, in its result, adverse to the proposed appellant. Accordingly, where that person was successful in the High Court in terms of result (as the applicant was), there is no right of further appeal.

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8 *Hepburn v Police* [1972] NZLR 92 (SC).

9 As to which, see the approach taken by Cooke P in *Black v Fulcher* [1988] 1 NZLR 417 (CA) at 420 and the remarks of Fisher J in *Herewini v Ministry of Transport* [1992] 3 NZLR 482 (HC) at 488. The judgment of the Court of Appeal in *Terry*, which the Court followed when the applicant sought special leave to that Court, is also entirely consistent with this approach.

10 See *Arbuthnot v Chief Executive of Department of Work and Income* [2007] NZSC 55, [2008] 1 NZLR 13; *Walls v Calvert & Co* [1994] 1 NZLR 424 (CA) referring to *Lake v Lake* [1955] P 336, [1955] 2 ALL ER 538 (CA); *Amalgamated Builders Ltd v Nile Holdings Ltd* (2000) 14 PRNZ 652 (CA); and *Caie v Attorney-General* [2006] NZAR 379 (CA).