

IN THE SUPREME COURT OF NEW ZEALAND

SC 59/2013
SC 60/2013
SC 61/2013
SC 62/2013
[2015] NZSC 138

BETWEEN

DOUGLAS ARTHUR MONTROSE
GRAHAM, MICHAEL HOWARD
REEVES, WILLIAM PATRICK
JEFFRIES AND LAWRENCE ROLAND
VALPY BRYANT
Applicants

AND

THE QUEEN
Respondent

Court: Elias CJ, William Young and Glazebrook JJ

Counsel: F M R Cooke QC for William Patrick Jeffries
Other applicants in person
C R Carruthers QC and D R La Hood for Respondent

Judgment: 24 September 2015

JUDGMENT OF THE COURT

There is no order for costs.

REASONS

[1] In issue is whether we should award costs against the applicants in respect of the recall application which was dismissed in our judgment of 22 July 2015.¹

[2] In addressing this question we have considered first whether we have jurisdiction to make such an award in respect of an application to recall a judgment refusing leave to appeal against conviction.

¹ *Graham v R* [2015] NZSC 109.

[3] Until the enactment of the Costs in Criminal Cases Act 1967, costs were not able to be awarded in relation to criminal appeals to the Court of Appeal. This was the effect of s 13 of the Criminal Appeal Act 1945 and s 391 of the Crimes Act 1961. This restriction was applicable not only to the “hearing and determination” of such an appeal but also in respect of “any proceedings preliminary or incidental thereto”.

[4] Section 391 of the Crimes Act was repealed by the Costs in Criminal Cases Act, s 8(1) of which provides for the making of orders for costs “[w]here any appeal is made”. The first schedule to the Costs in Criminal Cases Regulations 1987 provides for costs to be awarded in relation to applications for leave to appeal,² a provision which must be founded on the assumption that “appeal” in s 8 encompasses an application for leave to appeal. Such assumption is consistent with the non-technical approach which has sometimes been taken to the meaning of “appeal”, see for instance *CBI NZ Ltd v Badger Chiyoda*³ where a restriction on “appeal” was held to encompass an application to the Court to set-aside an award for error of law on its face. Unsurprisingly therefore, there are a number of cases in which jurisdiction to award costs in relation to an application for leave to appeal has been exercised or assumed.⁴ We see no reason why this jurisdiction should not extend to cover applications to recall a judgment refusing leave to appeal.

[5] For the reasons given in our judgment dismissing the recall application, some of the arguments presented in support of the application ought not to have been advanced and invited an award of costs; and this despite such awards being unusual in criminal cases. We have, however, decided not to award costs. We recognise that the applicants’ perceptions of events associated with the investigation and their trial are coloured by the personal consequences of the convictions. They were not well-positioned to consider dispassionately the merits of the arguments which were advanced. They were legally represented in relation to the recall application and

² Costs in Criminal Cases Regulations 1987, pt 1, sub-pt C.

³ *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZLR 669 (CA).

⁴ In *Underhill v R* [2014] NZCA 228 the Court of Appeal dismissed applications for special leave to appeal and made an award of costs under the 1987 Regulations. In *B v Dunedin City Council* [2014] NZCA 347 the Court of Appeal declined to make an order as to costs when dismissing an application for special leave but assumed that it had the jurisdiction to do so when considering the question. Dismissals of applications for leave to appeal in the High Court were accompanied by orders for costs in each of *O’Byrne v Waimakiriri District Council* HC Christchurch CRI-2011-409-65, 13 December 2011 and *Wilkins v Housing New Zealand Corp* [2014] NZHC 2566.

may well have thought that, if devoid of merit, the application would not have been advanced by counsel (who is no longer representing them). Sir Douglas Graham and Messrs Bryant and Reeves filed brief memoranda submitting to such orders as may be made and Mr Reeves apologised to the Court. Brief and non-tendentious submissions were filed on behalf of Mr Jeffries. The comments made in our judgment dismissing the recall application speak for themselves and, on reflection, we consider that they do not need reinforcement by way of an order for costs.

Solicitors:

Graham & Co, Auckland for Douglas Arthur Montrose Graham, William Patrick Jeffries and
Lawrence Roland Valpy Bryant
Luke Cunningham Clere, Wellington for Respondent