IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 65/2018
[2018] NZSC 96

BETWEEN	KARL TEANGIOTAU NUKU Applicant
AND	THE QUEEN Respondent

Court: William Young, O'Regan and Ellen France JJ

Counsel: Applicant in person
J A Eng for Respondent

Judgment: 17 October 2018

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

The background

[1] By a minute of 14 April 2016,[1] Winkelmann J declined the applicant's request for a transcript of the hearing in the Court of Appeal on 9 March 2016 of his appeal against conviction and sentence for aggravated robbery and unlawful possession of firearms.[2] She recorded that the applicant wished to have a transcript "for his own records and to assist him in his research and studies". Transcripts of hearings in the Court of Appeal are not prepared as a matter of course, and she did not see the reasons advanced by the applicant as warranting a direction that a transcript be prepared.

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1 *Nuku v R* CA7/2015, 14 April 2016 (Minute of Winkelmann J).
2 *Nuku v R* [2016] NZCA 179.

[2] The applicant subsequently applied again for a transcript. By this stage, his reason for seeking a transcript of the hearing was that he wished to use the transcript for the purposes of prosecuting complaints or proceedings associated with alleged wrongdoing by prison and police officers at Paremoremo Prison. This application was rejected by Winkelmann J in a minute of 24 October 2017.[3] She was of the view that the applicant's reason for seeking a transcript was not sufficient as the ability of the applicant to advance his complaints was not materially affected by him having (or not having) a transcript.

[3] What appears to have been a third application for a transcript was dealt with (and refused) by French J in a handwritten note of 12 June 2018. The applicant then wrote to the Court complaining of this decision, prompting a second minute of French J on 10 July 2018 in which she again declined to direct that a transcript be prepared and provided to the applicant.[4] She repeated an indication given in the note of 12 June 2018 that if the applicant wished to challenge the original decision of Winkelmann J, he should do so via an application for leave to appeal to this Court. She also indicated that there was no jurisdiction to convene a panel of three judges of the Court of Appeal to review Winkelmann J's decision.

[4] The applicant seeks leave to appeal against the first decision of Winkelmann J but also challenges the second decision of French J.

The first decision of Winkelmann J

[5] Rule 4(2) of the Court of Appeal (Access to Court Documents) Rules 2009 (which were in force at the time of the first application)[5] makes it clear that the rules were not to be construed as requiring preparation of documents which were not in existence at the time they were sought. The applicant thus could have had no entitlement to require the Court of Appeal to prepare a transcript of the hearing.

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3 *Nuku v R* CA7/2015, 24 October 2017 (Minute of Winkelmann J [No 2]).
4 *Nuku v R* CA7/2015, 10 July 2018 (Minute of French J).
5 Those rules were revoked by r 20 of the Senior Courts (Access to Court Documents) Rules 2017 on 1 September 2017.

[6] The electronic record of the hearing which presumably was available, did not form part of the "formal court record", as defined in r 3 but was within the definition of "document" in the same rule. The electronic record was thus not subject to the right of access to formal court records provided by r 5, but was subject to r 6(2) which provided that a record in electronic form could be copied by a party (or counsel for a party) only with permission of the court.[6] No such application was expressly made. If such an application is made, the Court of Appeal would need to determine whether arrangements could be made to accommodate it, for example, by provision for the applicant to listen to the relevant part of the electronic record.

The second decision of French J

[7] The issue dealt with by French J fell to be determined under the Senior Courts (Access to Court Documents) Rules 2017 which, for our purposes, are to the same general effect as the 2009 Rules.

Our approach

[8] It could be argued that the question whether a transcript should be prepared is a matter of administration and not subject to appeal for the purposes of ss 68, 70 and 71 of the Senior Courts Act 2016 or the corresponding provisions of the Supreme Court Act 2003. Rather than attempt to resolve that argument, on which we have not received full submissions, we are prepared to approach the application on the basis that:

(a) The first decision of Winkelmann J is a decision for the purposes of the 2009 Rules.

(b) The second decision of French J was made pursuant to the 2017 Rules.[7]

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6 See *Hartono v Ministry for Primary Industries* SC 61/2017, 3 May 2018 (Minute of the Court) where this Court adopted the same approach to r 9(5)(a) of the Senior Courts (Access to Court Documents) Rules 2017 which is in materially the same terms as r 6(2) of the Court of Appeal (Access to Court Documents) Rules 2009.

7 Senior Courts (Access to Court Documents) Rules 2017, r 9(5)(a).

(c) Both are stand-alone Court of Appeal decisions which are susceptible to the appellate supervision of this Court under the Supreme Court Act 2003 or the Senior Courts Act 2016.

Accordingly, the statutory criteria for leave to appeal apply.[8] From the point of view of the applicant, this is the most favourable basis upon which his application can be addressed.

[9] In her first decision, Winkelmann J dealt with the reasons then advanced by the applicant. His application for leave to appeal does not give rise to any question of public or general importance. As well, there is no appearance of error in her reasons and thus the miscarriage of justice ground has not been made out.

[10] Neither the 2009 nor 2017 Rules provide for decisions made by a single judge of the Court of Appeal to be reviewable by a panel of three judges.[9] There is thus nothing in the applicant's complaint against the refusal of French J to require such a review. We likewise do not see the rules as contemplating a series of applications requiring separate and independent judicial consideration. A judge is entitled to reject a second or subsequent application on the basis that the question in issue (that is, access to court records) has already been determined. For this reason, and because in any event the applicant's current ground for seeking a transcript was in fact addressed by Winkelmann J in her second decision, we see nothing in the application which would warrant a grant of leave in respect of the second decision of French J.

Disposition

[11] Accordingly, the application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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8 Supreme Court Act 2003, s 13; and Senior Courts Act 2016, s 74.

9 Compare *Greer v Smith* [2015] NZSC 196, (2015) 22 PRNZ 785, where the same conclusion was reached in respect of access requests dealt with by the Judge under the inherent jurisdiction of the court.