

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 60/2019
[2019] NZSC 113**

BETWEEN MARKO OTIS
Applicant

AND NEW ZEALAND POLICE
Respondent

Court: Winkelmann CJ, O'Regan and Ellen France JJ

Counsel: D P H Jones QC for Applicant
J E Mildenhall for Respondent

Judgment: 11 October 2019

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Mr Otis pleaded guilty to possession of methamphetamine (half a gram) and possession of utensils (a glass pipe and a cut straw). These items were found on him after a car in which he was a passenger was stopped and searched. He sought a discharge without conviction but that application was declined in the District Court.¹ He was convicted and fined and ordered to pay Court costs. His subsequent appeal to the High Court was unsuccessful² and the Court of Appeal declined leave for a second

¹ *New Zealand Police v Otis* [2018] NZDC 587 (Judge McGuire).

² *Otis v New Zealand Police* [2018] NZHC 1383 (Jagose J) [HC judgment].

appeal.³ As the latter decision is final, he now seeks leave for a direct appeal from the decision of Jagose J in the High Court.

Background

[2] The High Court Judge's assessment of the gravity of the offending was that it was low. In reaching that view the Judge considered new evidence about Mr Otis' personal circumstances. The Judge decided the offending was not sourced in the personal circumstances relied on. That finding was upheld in the Court of Appeal.⁴

[3] The Judge then addressed the consequences of a conviction. He accepted conviction might risk impeding job prospects. But Jagose J did not see the evidence as enabling this matter to be taken further given the absence of evidence about those prospects. In the end, the burden of conviction was seen as "no more than the natural consequence of the conviction, which follows on the gravity of the offending. It is not ... disproportionate".⁵

The proposed appeal

[4] Leave to appeal is sought on the basis the proposed appeal would raise a question of public importance about how the courts should consider and address personal circumstances in sentencing, particularly in this type of case.⁶ In addition, it is submitted a miscarriage of justice otherwise arises.⁷

[5] Mr Otis wishes to argue that in the High Court his personal circumstances were given insufficient weight. He relies on a number of circumstances including his rehabilitation, the link between his personal circumstances and his drug use, and the impact on his future employment prospects (Mr Otis is now 57 years old and is professionally qualified).

³ *Otis v New Zealand Police* [2019] NZCA 231 (Courtney, Lang and Whata JJ).

⁴ At [11] and [13].

⁵ HC judgment, above n 2, at [30].

⁶ Senior Courts Act 2016, s 74(2)(a).

⁷ Section 74(2)(b).

[6] The respondent opposes leave on the basis no question of general or public importance arises. Rather, the respondent submits this is a challenge to the High Court's case specific assessment of the facts and that assessment does not give rise to the appearance of a miscarriage of justice.

Our assessment

[7] Leave to appeal directly from the decision of the High Court is sought because the decision of the Court of Appeal to decline leave is final.⁸ The Court must accordingly be satisfied there are exceptional circumstances that justify a direct appeal to this Court.⁹

[8] That criterion is not met in this case. There may be questions about the approach to be taken to the assessment of disproportionality in the context of an application for a discharge without conviction. We do not consider it would be appropriate to address those questions in this case which turns on its particular facts. The factual matters have been addressed in some detail by the High Court and, indeed, the Court of Appeal in its decision declining leave to appeal. Nothing raised by Mr Otis suggests the High Court's analysis gives rise to exceptional circumstances which justify a direct appeal.

Result

[9] The application for leave to appeal is dismissed.

Solicitors:
Cook Morris Quinn, Auckland for Applicant
Crown Law Office, Wellington for Respondent

⁸ Criminal Procedure Act 2011, s 213(3).

⁹ Senior Courts Act, s 75(b). This threshold is even higher where an appeal against the decision of the Court of Appeal is precluded by statute, as it is in this case: *Burke v Western Bay of Plenty District Council* [2005] NZSC 46, (2005) 18 PRNZ 560 at [4]; and *Sena v New Zealand Police* [2018] NZSC 92 at [4].