

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 6/2019
[2019] NZSC 35**

BETWEEN RICHARD LYALL GENGE
 Applicant

AND THE QUEEN
 Respondent

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

Counsel: Applicant in person
 A D H Colley for Respondent

Judgment: 3 April 2019

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was, along with two co-offenders, convicted of rape and murder in 1995. He was sentenced to life imprisonment with a minimum period of imprisonment of 15 years for the murder and to a concurrent sentence of 12 years' imprisonment for the rape.¹

[2] The applicant filed an appeal in 1995 against his conviction for rape and against the minimum period of imprisonment imposed in relation to the murder. He did not appeal against his conviction for murder or against the sentence imposed for the rape at that time. He applied for legal aid. Legal aid was granted for the appeal

¹ *R v Kirner* HC Christchurch T43/95, 25 October 1995 (Fraser J).

against the minimum period of imprisonment imposed in relation to the murder, but declined in relation to his appeal against his conviction for rape.

[3] In early 1996, the applicant abandoned the appeal (both in relation to the minimum period of imprisonment for the murder and the conviction for rape). The appeal was formally dismissed by the Court of Appeal in February 1996. Although the applicant has served a term longer than the minimum period of imprisonment imposed on him in relation to the murder conviction, he has, to date been declined parole and remains a serving prisoner.

[4] In early 2017, some 21 years after his appeal to the Court of Appeal had been abandoned and formally dismissed, the applicant applied to that Court for leave to withdraw the notice of abandonment of his appeal against the rape conviction and the imposition of the minimum period of imprisonment for murder. He also applied for an extension of time to appeal against the murder conviction and the sentence imposed for the rape. The Court of Appeal dealt with these applications together. It declined both applications.²

[5] The applicant seeks leave to appeal to this Court against the Court of Appeal decision. In response, the Crown raises a jurisdictional issue. As the applicant's proceeding commenced before the Criminal Procedure Act 2011 came into effect, the applicable legislation in relation to the present application is the Crimes Act 1961.³ The right of appeal against a decision of the Court of Appeal in a criminal matter was dealt with in s 383A(1) of the Crimes Act, which provided:

With the leave of the Supreme Court, a convicted person may appeal to the Supreme Court against a decision of the Court of Appeal on appeal under section 383.

[6] Counsel for the Crown points to a number of leave decisions of this Court where the Court has concluded it has no jurisdiction to hear and determine an appeal against a decision of the Court of Appeal refusing to grant leave to appeal to that Court because such a decision is not “a decision of the Court of Appeal *on appeal*” for the purposes of s 383A (or “a decision of the Court of Appeal on an appeal” in terms of

² *Genge v R* [2017] NZCA 466 (Winkelmann, Wylie and Whata JJ).

³ Criminal Procedure Act 2011, s 397.

s 144A of the Summary Proceedings Act 1957).⁴ This same reasoning has been applied to a decision of the Court of Appeal refusing leave to withdraw a notice of abandonment.⁵

[7] Insofar as the present application relates to the Court of Appeal's refusal of an extension of time to appeal against the murder conviction and rape sentence, the nature of the Court of Appeal decision was not a refusal to grant leave, but rather a refusal to grant an extension of time. Nevertheless, the refusal to grant an extension of time cannot be characterised as a decision "on appeal", so the same jurisdictional hurdle confronts the applicant.⁶

[8] We conclude we do not have jurisdiction to hear and determine the proposed appeal. We therefore refuse leave. However, we have considered the submissions made by the applicant and concluded that we would not have granted leave even if we had jurisdiction. We record briefly our reasons for that conclusion.

[9] The applicant wishes to argue on appeal that the Court of Appeal ought to have allowed him to withdraw his notice of abandonment of his 1995 appeal. He argued that the refusal of legal aid for the appeal against the rape conviction in 1995 influenced his decision to abandon the appeal. The legal aid decision was part of the procedure of the Court of Appeal that was the subject of criticism in the decision of the Privy Council in *R v Taito*.⁷ Thus, he argues he should have been allowed a second chance to appeal under the principles set out in the Court of Appeal decision in *R v Smith*.⁸ The Court of Appeal rejected this argument. We accept that there may be room for an argument to the effect that, although the applicant did not fit within the class of appellants dealt with in *R v Smith*, that decision could have been applied to his situation by analogy. But, although the Court of Appeal did not ultimately give leave

⁴ For example, *Clarke v R* [2005] NZSC 60 at [2].

⁵ *Palmer v R* SC CRI 13/2004, 12 October 2004 at [2]–[4].

⁶ *Penman v R* [2016] NZSC 96 at [5]. An alternative would be a direct appeal to this Court from the High Court against the murder conviction and rape sentence but leave for such an appeal could be given only if there were "exceptional circumstances": Supreme Court Act 2003, s 14; and Senior Courts Act 2016, s 75. We address this possibility below at n 9.

⁷ *R v Taito* [2003] UKPC 15, [2003] 3 NZLR 577.

⁸ *R v Smith* [2003] 3 NZLR 617 (CA).

to the applicant to withdraw his notice of abandonment of his 1995 appeal, it did give full consideration to the merits of the appeal he wished to pursue in that Court.

[10] Having considered the Court of Appeal's analysis of those grounds of appeal, we do not consider that there is any realistic prospect that any of those grounds could be successfully advanced in this Court, and on that basis we see no miscarriage of justice arising from the way the Court of Appeal dealt with the applicant's application to withdraw his notice of abandonment.

[11] In relation to the decision of the Court of Appeal to refuse an extension of time to pursue appeals against the murder conviction and rape sentence, we are satisfied that no question of public importance arises. In addition, having considered the Court of Appeal's assessment of the proposed grounds of appeal, we are satisfied that there is no risk of a miscarriage if leave is not given in relation to this aspect of the case.⁹

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

Solicitors:
Crown Law Office, Wellington for Respondent

⁹ For the same reasons, we conclude there are no exceptional circumstances justifying leave to appeal directly from the High Court.