IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 11/2019
[2019] NZSC 37

BETWEEN	TALLEY'S GROUP LIMITED Applicant
AND	WORKSAFE NEW ZEALAND Respondent

Court:	Glazebrook, O'Regan and Ellen France JJ
Counsel:	J H M Eaton QC and P C Dawson for Applicant M L Wong for Respondent
Judgment:	5 April 2019

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Talley's Group Ltd (Talley's) was charged by WorkSafe New Zealand (WorkSafe) with failing to take all practicable steps to ensure the safety of its employee (Ms Hēmi) while at work contrary to ss 6 and 50(1)(a) of the Health and Safety in Employment Act 1992 (the Act).[1] The charges arose out of the operation of a forklift at the vegetable processing plant at which she worked. On Talley's application in the District Court, the charge was dismissed under s 147 of the Criminal Procedure Act

[1] Now repealed (Health and Safety at Work Act 2015, s 231(1)).

2011.[2] That decision was reversed in the High Court[3] and Talley's appealed unsuccessfully to the Court of Appeal.[4] Talley's now seeks leave to appeal to this Court.

Background

[2] Under the Act, charging documents had to be filed within a six-month time period.[5] The charging document in this case was filed on 20 November 2015, one day before the six-month time limit was to expire. The charging document gave no particulars of the practicable steps Talley's ought to have taken to ensure the safety of Ms Hēmi. Rather, the document provided that Talley's:

> Being an employer, failed to take all practicable steps to ensure the safety of its employee, namely [Ms] Hemi, while at work, in that it failed to take all practicable steps to ensure that she was not exposed to hazards arising out of the operation of a Yale forklift.

[3] On 1 December 2015, the charging document and a summary of facts were served by WorkSafe on Talley's. The summary of facts identified, in some detail, the four practicable steps it was alleged WorkSafe had not taken.

[4] Talley's pleaded not guilty. An expanded list of omitted practicable steps was provided in August 2016. Talley's applied to stay the proceeding or dismiss the charge on the basis the August expansion was an evasion of the six-month time bar and so was an abuse of process. Further, Talley's said that the charge as framed did not contain sufficient particulars to comply with the requirement in s 17(4) of the Criminal Procedure Act for Talley's to be fully and fairly informed of the substance of the charge.

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2 *WorkSafe New Zealand Ltd v Talley's Group Ltd* [2016] NZDC 23299, [2017] DCR 683 (Judge Maze).

3 *WorkSafe New Zealand Ltd v Talley's Group Ltd* [2017] NZHC 1103, (2017) 14 NZELR 584 (Faire J).

4 *Talley's Group Ltd v WorkSafe New Zealand Ltd* [2018] NZCA 587, [2019] 2 NZLR 198 (Cooper, Winkelmann and Williams JJ) [CA judgment].

5 Health and Safety in Employment Act 1992, s 54B. Under s 146 of the Health and Safety at Work Act 2015, there are differing periods (12 months and 6 months). See also ss 147 and 149 of that Act.

[5] The charge was dismissed in the District Court in part because there were insufficient particulars. Further, while the charge was not a nullity, the Court considered the defects were not saved by s 379 of the Criminal Procedure Act which provides that proceedings are not invalid for want of form unless the defects give rise to a miscarriage of justice.

[6] In the High Court, Faire J agreed with the District Court the particulars were insufficient to comply with s 17(4) of the Criminal Procedure Act. But the Judge found the defect was not fatal in terms of s 379 because the summary of facts provided sufficient particulars. Talley's could not point to actual prejudice sufficient to establish a miscarriage.

[7] The Court of Appeal dismissed Talley's appeal and a cross-appeal by WorkSafe. The Court found the particulars were the "pith and essence" of the charge and so were required to be included.[6] The Court concluded the charging document was not a nullity although defective in failing to provide the particulars.[7] It was not a nullity because there were particulars, albeit too sparse to comply with s 17(4). The Court also found that the charging document was saved by s 379.[8] The particulars in the summary of facts gave Talley's sufficient notice and Talley's would suffer no miscarriage of justice. The Court amended the charging document but the amendment was confined to the particulars set out in the summary of facts served on 1 December 2015.[9] Finally, the Court rejected Talley's claim the proceeding should be stayed.[10]

The proposed appeal

[8] Talley's seeks leave to appeal from the decision of the Court of Appeal. It wishes to argue as follows:

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6 CA judgment, above n 4, at [41]. This aspect was the basis of WorkSafe's cross-appeal in the Court of Appeal.

7 At [68].

8 At [77].

9 At [77]. That meant that if WorkSafe wanted to expand the particulars to reflect the August 2016 summary of facts, that would require an application to amend under s 133 of the Criminal Procedure Act 2011 for an order to that effect: at [78].

10 At [86].

(a) In considering s 379, the Court of Appeal was wrong to take into account the summary of facts. In part that is because even if a summary can be relied on, it cannot include a summary prepared after the expiry of a statutory time bar.

(b) The Court of Appeal was wrong not to order a stay particularly given WorkSafe's practice of filing unparticularised charging documents very late in the piece along with a summary of facts.

Assessment

[9] Taking first the approach to s 379, the principles applicable to provisions in the form now reflected in s 379 of the Criminal Procedure Act[11] have been well-traversed.[12] Further, as the Court of Appeal noted, citing this Court's decision in *Dotcom v Attorney-General*, the assessment required under s 379 is "factual and contextual" and all of the relevant surrounding circumstances may be considered.[13] No question of general or public importance is accordingly raised by this aspect of the proposed appeal. Rather, the question is one of the application of those principles to the particular facts. The arguments Talley's wishes to raise to support the contention the approach taken has given rise to a miscarriage of justice were carefully evaluated by the Court of Appeal. Nothing raised by Talley's suggests that a miscarriage of justice arises from that evaluation.

[10] In deciding not to stay the charge, the Court of Appeal applied the principles discussed by this Court in *Wilson v R*.[14] No question of general or public importance arises. Nor do we see any appearance of a miscarriage of justice in the Court of Appeal's assessment. The Court noted that it was not suggested this was a case of actual bad faith and, further, that in "the circumstances of this case and WorkSafe's (now former) charging practice, … the balance must fall on the side of bringing those accused of offences to trial".[15]

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11 Section 379 replaced s 204 of the Summary Proceedings Act 1957 in substantially similar terms.
12 See, for example, *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745.
13 CA judgment, above n 4, at [73].
14 *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705.
15 CA judgment, above n 4, at [85].

[11] In these circumstances, the criteria for leave are not met.[16] The application for leave to appeal is dismissed.

Solicitors:
Dawson & Associates Ltd, Nelson for Applicant
Crown Law Office, Wellington for Respondent

[16] Supreme Court Act 2003, s 13(2) and (4); and Senior Courts Act 2016, s 74(2) and (4).