ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 30/2019
[2019] NZSC 53

BETWEEN	ANARU HORI WHITE Applicant
AND	THE QUEEN Respondent

Court:	O'Regan, Ellen France and Williams JJ
Counsel:	R M Lithgow QC for Applicant J A Eng for Respondent
Judgment:	22 May 2019

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B Order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest permitted.

REASONS

[1] The applicant and two co-defendants are charged with kidnapping, aggravated robbery, wounding with intent to cause grievous bodily harm, and arson. In the District Court the applicant unsuccessfully sought a discharge under s 147 of the

Criminal Procedure Act 2011 prior to trial.[1] He now seeks leave to appeal directly to this Court against the decision of the District Court.

The proposed appeal

[2] The applicant wishes to argue he has a right to appeal against the pre-trial decision not to grant a s 147 discharge under s 296 of the Criminal Procedure Act. Section 296 relevantly provides:

> **296 Right of appeal**
>
> (1) This section applies if a person has been charged with an offence.
>
> (2) The prosecutor or the defendant may, with the leave of the first appeal court, appeal under this subpart to that court on a question of law against a ruling by the trial court.
>
> (3) The question of law in a first appeal under this subpart must arise—
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> (a) in proceedings that relate to or follow the determination of the charge; or
>
> (b) in the determination of the charge (including, without limitation, a conviction, an acquittal, the dismissal of the charge under section 147, or a stay of prosecution).

[3] In particular, the applicant seeks to argue that the Court of Appeal was wrong in its earlier decisions to treat s 296(3)(b) as giving a right of appeal to the Crown against the decision to discharge under s 147 but not to the defence.[2] The applicant's case is that the question whether or not to grant a discharge is a question of law and therefore s 296(2) applies. Otherwise, it is said, the defence is limited to judicial review solely from the decisions of the District Court. Finally, it is submitted that whether the Court of Appeal's approach is correct is a question of general or public importance and that a miscarriage of justice arises if the appeal is not heard.

[4] In opposing leave, the respondent submits there is no jurisdiction for an appeal by the applicant against the decision not to discharge him under s 147 and the Court of Appeal authority to that effect is correct.

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1 *R v Kreegher* [2019] NZDC 5687 (Judge Hobbs).

2 An appeal direct to this Court from the decision of the District Court is sought on the basis that, given its earlier decisions, the Court of Appeal would decline leave.

Our assessment

[5] As the submissions for the parties foreshadow, the scope of s 296 has been considered by the Court of Appeal.

[6] In *D (CA716/2015) v R* the Court of Appeal dismissed an application for leave to appeal under s 296 from a decision not to grant a discharge under s 322 of the Oranga Tamariki Act 1989[3] on the basis of delay.[4] Although the case concerned s 322, the Court addressed in a detailed way, the application of s 296. The Court found there was no jurisdiction to appeal from the decision not to discharge under s 322. In reaching that conclusion, the Court considered that not every pre-trial decision giving rise to a question of law automatically came within s 296.[5] The Court noted that in its earlier decision in *Anderson v R*, the words "relate to" in s 296(3)(a) had been interpreted as requiring a close link or connection between the question of law and the determination of the proceeding.[6] Further, the word "determination" in s 296 was treated as "ordinarily" meaning a decision that puts an end to the matter.[7]

[7] The Court in *D (CA716/2015) v R* noted that *Anderson* had decided that there was a right of appeal pre-trial from a decision refusing a defendant leave to change their election of trial by judge or jury. In doing so, the Court was influenced by the fact a pre-trial appeal would be the only meaningful remedy. In *D (CA716/2015) v R* the Court was of the view that declining an application under s 322 was "in a fundamentally different category".[8] That was because the trial would take place in the same manner and the issue of delay could be revisited in a post-trial appeal if the defendant was convicted.[9] Finally, the Court considered that the legislative history and purpose of the Criminal Procedure Act supported the conclusion that there was no jurisdiction to hear the proposed appeal.[10]

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3 At the time named the Children, Young Persons, and Their Families Act 1989.
4 *D (CA716/2015) v R* [2016] NZCA 190. It was common ground in that case that prior to the enactment of the Criminal Procedure Act 2011 a defendant who wished to challenge the decision not to discharge had no right of appeal from that decision pre-trial: at [9(a)].
5 At [17].
6 At [18], citing *Anderson v R* [2015] NZCA 518, [2016] 2 NZLR 321 at [42].
7 At [18], citing *Anderson v R*, above n 6, at [41].
8 At [20].
9 At [20].
10 At [22].

[8] The Court of Appeal in *Rowell v Commissioner of Inland Revenue* declined to reconsider *D (CA716/2015) v R.*[11] The Court held that, although in the context of a s 322 application, *D (CA716/2015) v R* was "authority for the point there is no jurisdiction under s 296 for an appeal on a question of law against a decision refusing to dismiss a charge so it applies equally to s 147 of the Criminal Procedure Act".[12]

[9] Where, as here, leave is sought for a direct appeal from the District Court, the Court must be satisfied it "is necessary in the interests of justice for the court to hear" the appeal and "that there are exceptional circumstances that justify" a direct appeal.[13] Those criteria are not met here where there is insufficient prospect of success in an appeal to this Court to justify the grant of leave. The Court of Appeal in the earlier decisions referred to above has carefully considered both the language and purpose of s 296 as well as the legislative history. Nor is there anything raised by the applicant that gives rise to the appearance of a miscarriage of justice. If convicted, the applicant has a right of appeal against conviction. In all these circumstances it is not necessary in the interests of justice for the Court to hear the appeal prior to trial.

Result

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

[11] For fair trial reasons, we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest permitted.

Solicitors:
Crown Law Office, Wellington for Respondent

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11 *Rowell v Commissioner of Inland Revenue* [2016] NZCA 471 at [22].
12 At [22].
13 Senior Courts Act 2016, s 75.