

**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR
IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203
OF THE CRIMINAL PROCEDURE ACT 2011. SEE
<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html>**

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 67/2020
[2020] NZSC 119**

BETWEEN **DANIEL CLINTON FITZGERALD**
Applicant

AND **THE QUEEN**
Respondent

Court: Glazebrook, O'Regan and Williams JJ

Counsel: K F Preston and D A Ewen for Applicant
P D Marshall and A D H Colley for Respondent

Judgment: 3 November 2020

JUDGMENT OF THE COURT

- A The application for leave to appeal is granted in part (*Fitzgerald v R* [2020] NZCA 292).**
 - B The approved question is whether the Court of Appeal was correct to find that s 106 of the Sentencing Act 2002 does not apply to Mr Fitzgerald.**
 - C The application for leave to appeal is otherwise dismissed.**
 - D The application to amend the applicant's notice of application for leave to appeal is dismissed.**
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REASONS

[1] Mr Fitzgerald is serving a seven-year sentence imposed under s 86D(2) of the Sentencing Act 2002, which is part of what is commonly known as the three strikes regime. He sought leave to appeal on three issues:

- (a) the interpretation of s 106 of the Sentencing Act 2002 in the context of third strike offences;
- (b) the Court of Appeal's refusal to grant a declaration of inconsistency in respect of s 86D(2) of the Sentencing Act; and
- (c) whether the High Court should have amended Mr Fitzgerald's charge under s 136 of the Criminal Procedure Act 2011.

[2] We have granted leave on the first ground.

[3] In relation to the second ground, we are not satisfied that this is a suitable case to consider whether there is jurisdiction to make a declaration of inconsistency in the context of criminal appeals. Mr Fitzgerald did not initially seek a declaration in either Court below, and this Court does not have the benefit of the opinion of the Court of Appeal given after hearing oral argument on the point.¹

[4] The third ground was not raised in the Court of Appeal. Mr Fitzgerald sought leave to amend his notice of application for leave to appeal to include this ground, and to appeal directly from the High Court. As Mr Fitzgerald has already exercised his right of appeal to the Court of Appeal, this Court cannot now hear a direct appeal from the High Court.² In any case, we do not consider that the criteria in s 74 of the Senior Courts Act 2016 are met. While we would not discount the possibility that s 136 of the Criminal Procedure Act may be activated on application by the defendant, we are not satisfied that there are sufficient prospects of success on these facts to justify

¹ The Court of Appeal sought submissions on the issue on its own initiative after the hearing in that Court: see *Fitzgerald v R* [2020] NZCA 292 (Clifford, Collins and Goddard JJ) at [16].

² *Uhrle v R* [2020] NZSC 62 at [7].

granting leave. We accordingly dismiss Mr Fitzgerald's application to amend his notice of application for leave to appeal.

Solicitors:
Crown Law Office, Wellington for Respondent