

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 42/2021  
[2021] NZSC 78

BETWEEN                      MANINDER SINGH  
   Applicant  
  
AND                                NEW ZEALAND POLICE  
   Respondent

Court:                          O'Regan, Ellen France and Williams JJ  
  
Counsel:                      A J Haskett and A A Rasheed for Applicant  
   C A Brook and S E Trounson for Respondent  
  
Judgment:                      2 July 2021

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**JUDGMENT OF THE COURT**

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- A     The application to adduce evidence in support of the application is dismissed.**
- B     The application for leave to appeal is dismissed.**
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**REASONS**

[1]     The applicant was convicted on a charge of driving a vehicle with the proportion of alcohol in his breath exceeding 400 mcg of alcohol per litre of breath.<sup>1</sup>

[2]     He appealed to the High Court but his appeal was dismissed.<sup>2</sup>

[3]     The applicant applied to the Court of Appeal for leave to bring a second appeal. In his application for leave, he sought leave to challenge the rejection by the

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<sup>1</sup>     *New Zealand Police v Singh* [2019] NZDC 10147 (Judge D J Harvey). The proportion of alcohol in the applicant's breath was 986 mcg of alcohol per litre of breath.

<sup>2</sup>     *Singh v New Zealand Police* [2020] NZHC 368 (Katz J).

High Court of the arguments he had made in the District Court. But, in addition to this, he also sought leave to raise a new ground, namely that the police had failed to comply with s 77(3A)(a) of the Land Transport Act 1998. This raised the “Block J” issue, which has been the subject of a recent judgment of this Court in *McKinney v New Zealand Police*.<sup>3</sup> In *McKinney*, this Court refused leave to bring an appeal that would, in substance, have amounted to a challenge to the decision of the Court of Appeal resolving the Block J issue in favour of the police: *Re Solicitor-General’s Reference (No 1 of 2020)*.<sup>4</sup>

[4] At the time the applicant’s application for leave to appeal was before the Court of Appeal, the Block J issue remained unresolved, as the Court had not yet heard *Re Solicitor-General’s Reference (No 1 of 2020)*. Because of the possibility that a decision against the police in *Re Solicitor-General’s Reference (No 1 of 2020)* would give rise to a miscarriage of justice in the applicant’s case, the Court granted Mr Singh leave to appeal in regard to the point at issue in *Re Solicitor-General’s Reference (No 1 of 2020)*.<sup>5</sup> In all other respects it dismissed his application for leave to appeal.

[5] Despite the fact that *Re Solicitor-General’s Reference (No 1 of 2020)* was resolved in favour of the police, the applicant pursued an appeal to the Court of Appeal pursuant to the leave that had been given.

[6] The Court of Appeal dismissed the appeal.<sup>6</sup> The Court rejected the applicant’s arguments to the effect that *Re Solicitor-General’s Reference (No 1 of 2020)* was decided *per incuriam*.<sup>7</sup> The applicant seeks leave to appeal to this Court against this aspect of the Court of Appeal decision, essentially as a means of challenging *Re Solicitor-General’s Reference (No 1 of 2020)*. In this respect, his application mirrors Mr McKinney’s application. We decline leave to appeal on this ground for the same reasons as we gave on the same issue in *McKinney*.<sup>8</sup>

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<sup>3</sup> *McKinney v New Zealand Police* [2021] NZSC 68.

<sup>4</sup> *Re Solicitor-General’s Reference (No 1 of 2020)* [2020] NZCA 563.

<sup>5</sup> *Singh v R* [2020] NZCA 411 at [22].

<sup>6</sup> *Singh v New Zealand Police* [2021] NZCA 91 (Kós P, French and Gilbert JJ).

<sup>7</sup> At [20]–[22].

<sup>8</sup> *McKinney*, above n 3, at [10]–[11].

[7] The applicant also sought to raise a new point of appeal in the Court of Appeal, namely that the POL515 procedure sheet (on which Block J appears) was not produced in evidence at his trial. The Court of Appeal responded to that point as follows:

[8] Leave was granted in September 2020 against the possibility that *Re Solicitor-General's Reference* might find the Block J wording non-compliant. It follows the appellant's first argument [that the procedure sheet was not in evidence]: (1) was not raised in the District Court; (2) was not raised in the High Court; (3) was not raised in the application for leave; (4) was not the subject of leave granted; and (5) was not the subject of any proper application for extended leave (for which a Crown application to adduce further evidence from the police might have been entertained). In any event, the argument is difficult to make with any cogency in the face of the constable's evidence at trial. As we made clear at the hearing, we will not entertain it.

[8] In effect, the applicant is asking us to determine as a first and last court a point as to the conduct of the trial which has not been considered by any of the Courts below and which was not within the scope of the leave granted by the Court of Appeal. In those circumstances, we do not consider it appropriate for this Court to give leave to appeal on this point. It is clear that if the applicant had sought the leave of the Court of Appeal to bring an appeal on this basis, the Court would have declined it. In those circumstances, no right of appeal against the refusal of leave would have been available. In any event, as the Court of Appeal noted, the argument was hard to make in the face of the police officer's evidence at the trial.<sup>9</sup> In those circumstances, there is no risk of a miscarriage of justice and, given the fact-specific nature of the point the applicant wishes to raise, no matter of general or public importance arises either. So the criteria for the grant of leave are not met.<sup>10</sup>

[9] The applicant sought leave to adduce evidence in support of the application. This was a copy of an affidavit that the respondent sought to adduce at the hearing of *Re Solicitor-General's Reference (No 1 of 2020)* in the Court of Appeal. That Court declined to receive it because it was not relevant to the questions it was addressing.<sup>11</sup> We declined leave to Mr McKinney to adduce it in support of his application for leave

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<sup>9</sup> The evidence given at the trial was that the police had used the POL515 procedure sheet when conducting Mr Singh's evidential breath test and no challenge had been made to the procedural aspect of the testing regime.

<sup>10</sup> Senior Courts Act 2016, s 74(2)(a) and (b).

<sup>11</sup> *Re Solicitor-General's Reference*, above n 4, at [28].

for the same reason.<sup>12</sup> We also decline leave to the applicant to adduce it in the present case for the same reason.

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

Solicitors:  
Crown Law Office, Wellington for Respondent

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<sup>12</sup> *McKinney*, above n 3, at [12].