NOTE: HIGH COURT ORDERS PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR OTHER IDENTIFYING PARTICULARS OF "L", "R" "MRS S", "MR S", "D" AND CERTAIN CONNECTED PERSONS PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAIN IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 35/2022
[2022] NZSC 83

BETWEEN	DAVID OWEN LYTTLE Applicant
AND	THE QUEEN Respondent

Court: Winkelmann CJ and O'Regan J

Counsel: C W J Stevenson for Applicant
S K Barr for Respondent

Judgment: 4 July 2022

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Mr Lyttle was convicted of murder after a lengthy jury trial and sentenced to life imprisonment with a minimum period of imprisonment of 11 years.[1] He appealed against his conviction. The Court of Appeal allowed the appeal and ordered a retrial.[2] Mr Lyttle then applied for the charge to be dismissed under s 147 of the

1 *R v Lyttle* [2019] NZHC 3454 (Mallon J).
2 *Lyttle v R* [2021] NZCA 46 (French, Courtney and Collins JJ).

Criminal Procedure Act 2011. That application was successful and the charge was dismissed.[3]

[2] There were a number of delays in bringing Mr Lyttle to trial, including a number of adjournments of fixtures, an aborted trial and a number of unsuccessful applications for a stay of proceedings. The delays were attributable to significant and repeated failures by the police to comply with their disclosure obligations under the Criminal Disclosure Act 2008.

[3] Mr Lyttle applied to the High Court for an award of costs of $150,000 against the prosecutor for these disclosure failings under s 364(2) of the Criminal Procedure Act. Under that subsection, the Court may order a defendant, a defendant's lawyer or a prosecutor to pay "a sum in respect of any procedural failure by that person in the course of a prosecution if the court is satisfied that the failure is significant and there is no reasonable excuse for that failure". The application was made and dealt with before the appeal against conviction had been heard by the Court of Appeal. The High Court made a costs order of $75,000 against the police, but did not make any order against the Crown prosecutor who took over the conduct of the case in October 2016.[4] Mr Lyttle had sought an order that half of the costs be paid by the Crown prosecutor.

[4] Both the Crown and Mr Lyttle appealed against the High Court decision. Both appeals were dismissed.[5]

[5] Mr Lyttle now seeks leave to appeal to this Court against the Court of Appeal decision.

[6] There is no dispute that the disclosure failings engaged s 364 of the Criminal Procedure Act. The Crown accepted that in the High Court, but argued that no costs order was appropriate and that, if any award was made, it should be made

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3 *R v Lyttle* [2021] NZHC 3519 (Simon France J).

4 *R v Lyttle* [2020] NZHC 488 (Mallon J) [HC judgment]. That order was inclusive of a sum already paid for the Lyttle family's accommodation and travel costs during the Wellington trial. In a later judgment, Mallon J ordered that $3,042.26 should be paid to the applicant's wife from the $75,000 ordered under s 346(2) of the Criminal Procedure Act 2011: *R v Lyttle* [2020] NZHC 2392 at [8].

5 *R v Lyttle* [2022] NZCA 52 (Kós P, Courtney and Collins JJ) [CA judgment].

against the police only. The Crown's concession that s 364 was engaged was unsurprising and appropriate, given the failures in relation to disclosure, which are set out in some detail in the Court of Appeal judgment.[6]

[7] It was accepted that, for the purposes of s 364, both the police and the Crown prosecutor were "prosecutors" against whom an order for costs could be made under that section. But, as noted earlier, the High Court Judge found that all of the $75,000 award should be paid by the police as the "prosecutor" responsible for the procedural failures on a practical level.[7]

[8] Mr Lyttle's appeal to the Court of Appeal sought both a higher award and an order that the Crown prosecutor pay half of the costs. The Court of Appeal rejected the argument that the High Court Judge had erred in the quantum of the award, and therefore dismissed both the Crown's appeal and Mr Lyttle's appeal in relation to quantum.[8] The Court of Appeal also rejected Mr Lyttle's argument that the Court should order the Crown prosecutor to pay half of the costs. The Court upheld the High Court Judge's finding that the Crown prosecutor was not personally to blame for the disclosure failings, and that therefore an award of costs against her was not called for.[9]

[9] The application for leave to appeal to this Court raises for consideration only the question as to whether the Crown prosecutor should have been ordered to pay half of the costs award. The applicant wishes to argue, if leave is granted, that the failure to make an award against the Crown prosecutor personally frustrated the purpose of s 364 to incentivise compliance with procedural obligations in relation to criminal proceedings and failed to recognise a duty incumbent on the Crown to ensure compliance with disclosure obligations. As well, he says the Court of Appeal erred in failing to recognise the judiciary's role in incentivising disclosure compliance to ensure fair trials. He argues that leave should be granted so that the obligations of the Crown (as distinct from the police) can be elucidated by this Court. He points to the significance of the disclosure failures in this case in relation to the admissibility of the

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6 At [44]–[63].
7 HC judgment, above n 4, at [84]–[87] and [93].
8 CA judgment, above n 5, at [93]–[94].
9 At [99]–[103].

admissions made by Mr Lyttle as a result of a "Mr Big" operation and the Crown's proposed evidence from a jailhouse informant. Together, these points are said to give rise to a matter of general or public importance.[10]

[10] We accept that the nature of the obligations of disclosure on the part of the prosecution is an important issue. We also accept that the disclosure failings in this case were both serious and repeated, and that they had a significant impact on the conduct of the proceeding. However, the argument the applicant wishes to make on appeal is confined to the question of which Crown agency should be subject to the award. Both the High Court and the Court of Appeal found that the responsibility for the disclosure failures rested with the police, and not with the Crown prosecutor.[11] There are, therefore, concurrent findings of fact to that effect. In those circumstances, we are not satisfied that it is in the interests of justice to grant leave for an appeal to this Court in which the essential issue would be a challenge to the factual findings made in the Courts below in the present case, rather than an evaluation of an issue of principle relating to disclosure obligations under the Criminal Disclosure Act or costs awards under s 364 of the Criminal Procedure Act.[12]

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

Solicitors:
Crown Law Office, Wellington for Respondent

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10 Senior Courts Act 2016, s 74(2)(a).
11 CA judgment, above n 5, at [98]–[104], upholding the finding of the High Court (HC judgment, above n 4, at [84]–[87]).
12 Senior Courts Act, s 74(2)(a).