IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 56/2025
[2025] NZSC 182

BETWEEN	BENJAMIN RICHARD HENDERSON Applicant
AND	THE KING Respondent

Court: Glazebrook, Ellen France and Williams JJ

Counsel: R J T George for Applicant
M R L Davie for Respondent

Judgment: 28 November 2025

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant, Mr Henderson, was on parole. He provided a false urine sample for a drug test he was required to take under the special conditions of his parole. He pleaded guilty to failing or refusing to provide a urine sample under s 71A of the Parole Act 2002 (Parole Act charge). He was convicted and discharged.

[2] Mr Henderson was also charged with attempting to pervert the course of justice under s 117(e) of the Crimes Act 1961 (Crimes Act charge). This further charge related to the same incident. The issues arising are whether the special plea of previous conviction[1] is available in relation to the Crimes Act charge and whether, in any event, the "course of justice" element of that charge can be satisfied. Mr Henderson's appeal

[1] Criminal Procedure Act 2011, s 46.

to the Court of Appeal on these questions was dismissed and he now seeks leave to appeal to this Court.[2]

Background

[3] In May 2020, Mr Henderson was sentenced to imprisonment for six years and five months for dishonesty, firearm and drug offences. He was paroled on 22 September 2021. Two special conditions of his parole were that he was not to possess or consume drugs or alcohol and that he was to attend an alcohol and drug assessment.

[4] On multiple occasions between February and September 2023, Mr Henderson was required but failed to attend drug assessments, and on one occasion he failed to provide a urine sample. Following a formal warning about the consequences of further non-compliance, he attended an appointment on 9 October 2023. He provided a sample, but it was not human urine. He was recalled to prison.

[5] On 10 November 2023, Mr Henderson pleaded guilty to a single charge under s 71A of the Parole Act of failing to provide a valid urine sample. He was convicted and discharged.

[6] On 3 November 2023, the Police charged Mr Henderson with wilfully attempting to pervert the course of justice under s 117(e) of the Crimes Act "by providing a false urine sample when required to under a Parole Act 2002 special release condition". The Police summary of facts stated, relevantly, that "[t]he analysis of the defendant's sample returned a result of 'inconsistent with human urine'".

[7] The applicant entered a special plea of previous conviction,[3] arguing that the Crown was precluded from proceeding with the Crimes Act charge due to his conviction on the Parole Act charge. He also made an application for the Crimes Act charge to be dismissed under s 147 of the Criminal Procedure Act 2011 on the basis that there was no valid "course of justice" to pervert or, alternatively, that no useful purpose would be served by the proceeding continuing.

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2 *Henderson v R* [2025] NZCA 147 (Palmer, Brewer and Gault JJ) [CA judgment].
3 Criminal Procedure Act, s 46.

[8] On 10 June 2024 in the District Court, Judge Crosbie ruled it was arguable that there was a "course of justice" on the facts as alleged.[4] On that basis, Mr Henderson pleaded guilty while reserving his right to appeal, and was convicted.[5]

Court of Appeal

[9] Mr Henderson appealed to the Court of Appeal on the two issues decided by the District Court.

[10] On the first issue, the Court of Appeal held that the conduct underlying the two charges was not substantially the same.[6] The Parole Act charge involved an omission: Mr Henderson did not provide a urine sample in that no urine was provided at all.[7] The Court noted that this was the basis on which the applicant pleaded guilty to the charge and was reflected in his own special plea that he "*did not provide a genuine sample* and instead substituted a form of synthetic urine".[8]

[11] This omission, the Court held, differed from the positive act underlying the Crimes Act charge—namely, that the applicant provided a false urine sample.[9] Thus, there was not one act or omission constituting an offence under both Acts in terms of s 10 of the Crimes Act (triggering the bar to double punishment in s 10(4)). Further, they were not the same offence or a different offence arising from the same facts in terms of the previous conviction plea referred to in s 46 of the Criminal Procedure Act. The Court therefore found that the special plea was not available to the applicant.[10]

[12] On the second issue, the Court noted its earlier decision in *Machirus v R*, which held that the "course of justice" should "properly be given a broad interpretation" so that proceedings of the Parole Board assessing whether a prisoner should remain in prison after reaching their parole eligibility date are a course of justice.[11] The Court

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4 *R v Henderson* [2024] NZDC 12998 at [84].
5 *R v Henderson* DC Christchurch CRI-2023-009-7388, 10 July 2024 (Judge Crosbie) at [3] and [8]–[9].
6 CA judgment, above n 2, at [24].
7 At [23].
8 As quoted at [23] (emphasis added).
9 At [24].
10 At [24]–[25].
11 At [26] citing *R v Machirus* [1996] 3 NZLR 404 (CA) at 411–412.

noted it may be that a process of monitoring compliance with conditions imposed by the Parole Board itself constitutes a course of justice, but the point was not addressed by counsel so it did not address the issue further.[12]

[13] The Court also pointed to authorities that suggested acts undertaken prior to the commencement of a proceeding or investigation may constitute an attempt to pervert the course of justice in some circumstances.[13] Reference was made to the Court of Appeal decision in *McMahon v R* which examined previous authorities and noted that:[14]

> It is not necessary for court (or tribunal) proceedings to have been actually instituted. It suffices that there is an act which has a tendency to prevent or obstruct a prosecution which an accused contemplated might follow with an intention on the part of the accused to pervert the course of justice.

[14] Concluding on the second issue, the Court of Appeal held that the applicant in this case would reasonably have apprehended that an investigation would follow failure to comply with the drug testing regime given his prior failures and the formal warning.[15] The Court held that the applicant's failure to provide a sample, combined with his further act of providing a false sample, had "a tendency to deflect or adversely affect a future investigation that would inform the Parole Board as to whether Mr Henderson should be recalled to prison".[16] As this was capable of constituting an action that perverts the course of justice, the appeal was dismissed.[17]

Submissions

For the applicant

[15] Counsel for the applicant submits that the Court of Appeal's judgment creates "significant over-criminalisation" in that it has substantially widened the actus reus of a charge under s 117(e) of the Crimes Act. The applicant submits that there have been no other cases where the act or omission alleged to have a tendency to pervert the

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12 CA judgment, above n 2, at [32].
13 At [27].
14 At [27(a)] citing *McMahon v R* [2009] NZCA 472 (reasons judgment) at [87(c)] and see at [87(e)] (footnotes omitted).
15 CA judgment, above n 2, at [34].
16 At [34].
17 At [35]–[37].

course of justice is part of, or contemporaneous with, the alleged offence under investigation.

[16] The applicant submits that the Court's formulation of the "boundaries" of the actus reus for the s 117(e) offence also captures general failure to comply with any special condition. Counsel points to two New South Wales Court of Criminal Appeal decisions that, it is submitted, reduced the scope of the "course of justice" by distinguishing the Probation and Parole Service's statutory functions of overseeing and administering Court orders (not falling within the "course of justice") from its function of conducting enforcement proceedings that may be filed with the court.[18]

[17] Counsel submits that allowing the conviction to stand would create a substantial miscarriage of justice, and it is a matter of general and public importance that the boundaries of the actus reus of s 117(e) are correctly defined.

For the respondent

[18] The respondent supports the Court of Appeal's reasons in respect of both issues. In addition, the respondent submits this case is analogous to *R v Rafique*, where a firearm was discharged, killing a person, and the offenders disposed of the firearm and ammunition.[19] As a police investigation and legal proceedings were inevitable, the disposal of the firearm was held to constitute an attempt to pervert the course of justice.[20] Counsel submits that proximity in time of the events is not a distinguishing factor: a person who attempts to pervert the course of justice a short time after the event which gives rise to the course of justice is no less culpable than the one who takes longer to act.

[19] The respondent further submits that the actus reus as defined by the Court of Appeal would not capture the applicant's failure to provide urine. If Mr Henderson had merely failed to provide a urine sample, the course of justice would have played out as it ought to: the Parole Board would have determined a recall

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18 *Tourni v R* [2010] NSWCCA 317 at [51]; and *Ishac v The Queen* [2011] NSWCCA 107, (2011) 211 A Crim R 102 at [49].
19 *R v Rafique* [1993] QB 843 (CA).
20 At 851.

application and may have made a recall order. The Crimes Act charge would not have been laid.

[20] The respondent submits that the broad actus reus of a s 117(e) charge is a design feature in that it enables the law to respond to the many and varied ways an offender can seek to pervert the course of justice. It is the mental element that keeps the offence within appropriate bounds.[21]

Assessment

[21] As to the relationship between the elements of the Parole Act and Crimes Act charges, the applicable principles in relation to special pleas of prior conviction are well settled and were applied in this case. In any event, there are insufficient prospects of success to warrant granting leave on that issue.

[22] As to the definition of "course of justice", while the prospect of over-criminalisation may give rise to a question of general and public importance, that issue does not arise on the particular facts given that, as the Court of Appeal noted, Mr Henderson was on notice that failure to provide a urine sample risked him being subjected to a recall application.[22] On any view of it, the required relationship between the conduct and the relevant course of justice was made out.

[23] It follows that no issue of general or public importance arises on this ground,[23] nor is there any prospect of a miscarriage of justice.[24] We are not satisfied that it is necessary in the interests of justice for this Court to hear and determine the intended appeal.[25]

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21 *R v Kong* [2011] NZCA 537 at [47].
22 CA judgment, above n 2, at [34].
23 Senior Courts Act 2016, s 74(2)(a).
24 Section 74(2)(b).
25 Section 74(1).

Result

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

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent