NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF CD'S NAME AND ANY MEDICAL AND PSYCHIATRIC EVIDENCE TENDERED OR REFERRED TO IN THE DISTRICT COURT PROCEEDING REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 5/2025
[2025] NZSC 49

BETWEEN	AB (SC 5/2025) Applicant
AND	THE KING Respondent

Court: Ellen France and Miller JJ

Counsel: T D A Harré for Applicant
A J Ewing for Respondent

Judgment: 7 May 2025

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant, whom we will call "AB" because the name of his co-offender "CD" has been suppressed, seeks leave to appeal certain convictions.[1]

[2] The ground of the proposed appeal is that the proceeding in which he was convicted was an abuse of process, because he had been removed from Australia and returned to New Zealand in what amounted to a disguised extradition. He says that

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[1] For this reason we do not provide citation details to the lower Court's judgments, except for the judgment under appeal: *AB (CA635/2023) v R* [2024] NZCA 688 (Mallon, Hinton and Moore JJ).

this may justify a stay because of the potential to undermine public trust in the administration of justice.

[3] AB and his co-offender fled New Zealand to evade arrest. AB had neither a valid passport or a visa so Australian immigration officials decided that he must be removed. They escorted him onto a plane bound for New Zealand, where he was arrested.

[4] AB filed an application to have the District Court stay the prosecutions for abuse of process. An application for judicial review also failed. The challenge was then renewed on AB's conviction appeal in the Court of Appeal. AB contended that there was a joint common intention between Australian authorities and New Zealand Police | Ngā Pirihimana o Aotearoa to deliver AB into the hands of the New Zealand Police and the New Zealand authorities had withheld information, such that it fell on the Crown to prove that AB's removal from Australia was not an abuse of process.[2]

[5] The Court of Appeal did not accept that the Crown was obliged to prove there had been no misconduct.[3] It added that much of the evidence was not held by the New Zealand authorities in any event, and they were not responsible for any material which might have been withheld by Australian authorities under Australian law.

[6] The Court reviewed the facts in detail. It found, as the District Court (on a pretrial application for stay) and the High Court (on judicial review) had done, that AB was not the victim of a disguised extradition.[4] Rather, the New Zealand authorities decided not to pursue extradition because the Australian authorities had indicated that he would be returned to New Zealand after charges he was facing in Australia were dealt with.[5] The Court held there was nothing improper in the New Zealand Police taking advantage of the fact that the Australian authorities had decided he must be removed, and New Zealand was the natural destination to which he would be removed.[6]

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2 At [70].
3 At [84].
4 At [106].
5 At [107].
6 At [108]–[110], [113] and [115].

[7] AB wishes to argue that the Court erred in its approach to the burden of proof, wrongly concluding that an evidential burden would not shift to the Crown absent demonstrable evidence indicating an obvious abuse of process, and wrongly concluding that a lack of direct evidence about certain matters was not sufficient to reverse the burden of proof.[7] It is said that this approach appears to depart from previous authorities by setting a higher threshold for a change of evidential burden, and this warrants this Court's attention.[8]

[8] We are not persuaded that the proposed appeal raises a question of general or public importance.[9] AB does not point to any error in the Court of Appeal's statement of principles applicable to a stay application.[10] Nor did it appear to misinterpret the relevant authorities dealing with when an evidential burden may move to the Crown. As to whether the burden moved in this case, three Courts below have found that New Zealand authorities were not complicit in any breach of Australian law but merely took advantage of the Australian authorities' decision that AB must be removed. They did not withhold relevant information which they held, and they could not be held responsible for material which Australian authorities might have decided to withhold under Australian law.[11] The established facts do not clearly point to misconduct which might lead to an adverse inference unless the Crown was able to rebut it. For the same reasons, there is no appearance of a miscarriage of justice.[12]

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

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

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7 See at [83]–[84].

8 Citing *Regina v Grant* [2005] EWCA Crim 1089, [2006] QB 60 at [45]; and *Smith v R* [2020] NZCA 499, [2021] 3 NZLR 324 at [55(e)]. This Court declined leave to appeal *Smith*: *Smith v R* [2023] NZSC 134.

9 Senior Courts Act 2016, s 74(2)(a).

10 See *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705.

11 We have considered the applicant's memorandum seeking leave to file additional material in this Court but nothing in it suggests this conclusion is incorrect.

12 Senior Courts Act, s 74(2)(b).