

IN THE SUPREME COURT OF NEW ZEALAND

**SC 18/2008
SC 32/2008**

BETWEEN Shaun Anthony King and Deborah Gordon-Smith

Appellants

AND The Queen

Respondent

Court: Elias CJ, Blanchard, Tipping. McGrath and Wilson JJ

Counsel: K H Cook for Appellants
 C L Mander for Respondent

Hearing: 10 July 2008

APPLICATION FOR LEAVE TO APPEAL

9.00 AM

Elias CJ Yes Mr Cook you are appearing by video-link. Can you see us all?

Cook Yes I can see Your Honours.

Elias CJ Thank you. Mr Mander you appear for the Crown.

Mander Thank you.

Elias CJ Mr Cook I wondered whether it might assist you if Mr Mander went first? The issue we have to look at is really just the one of jurisdiction

and it occurred to us that it might be the more logical sequence, but if you would prefer to go first of course you may.

Cook No Your Honour I'm happy to go with the course you've suggested.

Elias CJ Thank you. Mr Mander does that suit you?

Mander That's fine Ma'am. Yes may it please the Court, the Crown has drawn the Court's attention to a perceived jurisdictional difficulty with Mr King's application for leave. The appeal pursuant to s.380 of the Crimes Act on reflection could not have been taken against him in the Court of Appeal because he was the subject of a 347 discharge.

Blanchard J So the Court of Appeal had no jurisdiction?

Mander Not in respect of that particular respondent Sir. However there were nine other respondents, or perhaps I should say seven others. Perhaps if I could just assist the Court

Elias CJ So it's not a question of granting leave and quashing the decision of the Court of Appeal Mr Mander?

Mander No Ma'am. There were five accused found guilty by the jury at trial, one of whom was the applicant Gordon Smith. Two were found not guilty. They were the respondents in the Court of Appeal Boyce and Chen, and three were discharged at trial pursuant to s.347, one of whom was Mr King. There was some discussion in the Court of Appeal as to representation, although the jurisdictional issue was not raised in the Court of Appeal and indeed really only became apparent upon a cost application being made by Mr McCoy after the appeal had been decided and when it became apparent perhaps as it should have been apparent previously that Mr King was of course in no jeopardy. Justice O'Regan, at a telephone conference, discussed the issue of representation. Two of the accused who were found guilty at trial appealed to the Court of Appeal. One had a conviction appeal – a Mr Jarden – and another had a sentence appeal which was indeed Miss Gordon-Smith.

Elias CJ But that didn't raise the point in this s.380 application?

Mander No it didn't Ma'am. The initial suggestion of the Court was that counsel appearing in respect of those appeals could argue in opposition to the Crown's s.380 appeal. However counsel, Mr Cook and Mr Rapley, who had taken the lead in the High Court on the pre-trial argument relating to the jury-vetting issue wished to be heard in the Court of Appeal.

Elias CJ Rapley for the Crown, or

Mander No Mr Rapley appearing for a Mr Stephens who also was the subject of a 347 discharge. And Mr McCoy came into the proceedings to lead Mr Cook in the Court of Appeal.

Elias CJ For Miss Gordon-Smith on the sentence appeal?

Mander No, for Mr King.

Elias CJ Oh sorry, for Mr King.

Mander So that is as matters stood in the Court of Appeal. Now the 380 appeal procedure was available to the Crown in respect of the respondent's Boyce and Chen, who had been found not guilty by a jury which the Crown had obviously not been able to have the benefit of the vetting. And while it is acknowledged that the likelihood of the Court of Appeal ordering a new trial in respect of those was perhaps theoretical. It, in my submission, still remained but that was a

Elias CJ With sufficient foundation, yes.

Mander Indeed Ma'am. So accordingly the submission has been made, or the observation made, in respect of Mr King's application that he was never in any jeopardy in the Court of Appeal and his application to this Court for leave to appeal is moot.

Tipping J What relief could we give him?

Mander None indeed. And similarly the observation has now been made in respect of the substitute applicant, Miss Gordon-Smith.

Blanchard J Just so I understand the position in the Court of Appeal, you say that all nine were respondents to the Crown's application under s.380?

Mander Purported to be. They were all served with the

Blanchard J Yes, well the Crown brought its application, let's call it an appeal, in respect of all nine so they were all parties to it there.

Mander Indeed Sir.

Blanchard J And therefore the Court of Appeal judgment, though intituled the Queen against King and Stephens, could have been intituled, probably should have been intituled, the Queen against the nine of them.

Mander Yes.

Blanchard J Right. So that means that the Court of Appeal did have jurisdiction, although not in respect of the two people who it actually nominated in its judgment.

Mander No Sir, in fact there were three.

Blanchard J But the problem at the moment is that Mr Cook and I think the Crown also are looking around for someone who can come here, and the two people in respect of whom there really was jurisdiction in the Court of Appeal have not shown up and put their hands up to bring a further appeal.

Mander That is the difficulty Sir, yes.

Blanchard J Thank you. I just wanted to clarify.

Elias CJ There was jurisdiction – I'm sorry I haven't looked at the provisions closely here. There was jurisdiction for the Crown to bring its s.380 application in respect of people who had been acquitted but not of people who have been 347'd.

Mander That's correct Ma'am.

Blanchard J That's certainly for a long time been understood to be the orthodox interpretation in s.380.

Tipping J That's why the Crown often says don't 347 them direct an acquittal.

Mander Indeed Sir, yes. The slight difficulty of course arises in respect of those who were convicted, notwithstanding a favourable ruling by the High Court, and whether a 380 appeal could be taken in respect of those accused given

Tipping J There would be no relevant ground would there?

Mander That's the difficulty I think Sir, because what would the Crown be seeking to achieve in the Court of Appeal? And now of course that becomes the difficulty in this Court, because what could Miss Gordon-Smith achieve when she was convicted notwithstanding the ruling being in her favour? What could she ask this Court to do?

Elias CJ Alright, well I think that's probably as far as you take it isn't it Mr Mander?

Mander I think it is Ma'am, yes.

Elias CJ And we should here now from Mr Cook thank you. Yes Mr Cook.

Cook Thank you Ma'am. Just a preliminary matter. I'm just having some trouble hearing the comments from Your Honours' end at this end.

Elias CJ It's as high apparently as it goes. It may be we should pull the microphones closer to us. Can you just indicate when you don't hear.

Cook Yes, yes.

Blanchard J Which of the Judges are you having difficulty hearing?

Cook That was hard to hear Your Honour.

Blanchard J Right. I'll keep quiet.

Elias CJ No, no, pull it closer to you.

Tipping J Do you want us to speak in turn.

Blanchard J Is that better?

Cook Yes that's better, thank you, I'm sorry.

Elias CJ Alright, if you could just indicate if you don't hear Mr Cook and what's your response to this unfortunate impediment?

Cook I suggest that there are three options available to the Court and firstly substitution of Miss Boyce; secondly that Miss Gordon-Smith is an available applicant; and thirdly, and probably the most difficult is that Mr King continues. Just against that I understand from the Solicitor General's submissions in response to the King application, that he agrees that the matters are a general and/or public importance, but it's this jurisdictional impediment that's really stopping this matter going forward.

Blanchard J Speaking for myself, but I think others on the bench would agree, I see this as a matter of general or public importance.

Elias CJ Yes I think you can proceed on that basis Mr Cook.

Cook Thank you.

Tipping J You've got to show us how we have jurisdiction.

Cook Yes. The pragmatic solution suggested by the Solicitor General at para.6 of his submissions is to substitute Miss Boyce because she doesn't suffer the same jurisdictional difficulties. The problem with that is that despite best efforts I haven't been able to locate Miss Boyce. Mr Chen I think can be taken out of the equation because he's moved back to China and there's no chance of finding him whatsoever. Miss Boyce is in Auckland and despite extensive efforts I haven't been able to find her, thus I have no instructions; no signed legal aid form, but I infer from the Solicitor General's and Mr Mander's submissions that Miss Boyce is not under harm of a potential retrial and it's never been suggested that the Crown would seek that.

Blanchard J But the Court would be in a very strange position if she came along midway through and said hang on a minute, I have never authorised any application

Cook Yes.

Blanchard J And I'm not authorising it now.

Elias CJ Well I think really Mr Cook we can't entertain an appeal that's not properly brought by the appellant and that seems to dispose of that at this point. One thing that occurred to me is that the Court of Appeal did say in its judgment that really it had been asked for an advisory opinion and it may be that if the Crown, once this matter resolved, it might apply for declaratory judgment and then move the thing through the Court system and perhaps constitute it on the basis that those who've argued it so far may appear and argue it, but really that's only something that might be looked into if we don't have jurisdiction, but at the moment it's really hard to see that there is any basis upon which we could entertain either of the two applications for leave to appeal we have before us.

Cook Yes. If I could just deal with Miss Gordon-Smiths. This is probably where I part company from my learned friend because I suggest she does have jurisdiction and really the question which needs to be answered, and it was posed I think when I was having trouble hearing, by His Honour Justice Tipping, what is the remedy which she can be granted, or the relief that could be given to her? Pursuant to s.382, ss.2(a) there was a specifically contemplated statutory relief in that the Court of Appeal on the case stated could have confirmed the ruling, and that in my submission means that that's a remedy that's open to this Court.

Blanchard J But how does that assist her?

Cook Her remedy is just that her stance has been vindicated in the High Court.

Blanchard J But it's already, well yes

Tipping J Is that a theoretical victory rather than a practical victory Mr Cook? I mean it can't effect her on the ground can it?

Cook No I completely agree with that observation Your Honour.

McGrath J And no rights of hers have been consequentially affected by the Court of Appeal decision?

Cook No, that's again correct, save her right to see the correct decision reached.

Tipping J It's a bit like someone winning in the Court of Appeal and saying oh good, but I think I had better get this confirmed by the Supreme Court. I mean I admire your ingenuity Mr Cook and I'm not trying to be facetious, but I'm just trying to see where this would lead the matter of sort of concept.

Cook She lost in the Court of Appeal and that's probably the distinction that I made.

Tipping J But she lost on the sentence appeal.

Cook Yes, she also did lose on that appeal, but she also lost in the case stated where she was a party, and as a slight bit of background, probably not bearing too much on the question, her counsel, Mr Bailey, he was exercising a watching brief; they were given no submissions on the case-stated appeal but he was there and if need be he could have been called upon, and that really just confirms what's already been suggested about the intitular from the Court of Appeal.

Elias CJ Well she was a party to the determination of the question of law under the s.380 procedure, and that was decided adversely to her.

Cook Yes, yes.

Elias CJ And you say that that is sufficient to enable her appeal?

Cook Yes, if one looks

Elias CJ Do you have any authority for that?

Cook If one looks at the authority of *Fogdon* which was relied upon by the Court of Appeal in *Grime*, and just as a wee interlude, *Grime's* going to be the problem with Mr King. *Fogdon* was a majority judgment delivered by the then Chief Justice Sir Michael Myers, and briefly in *Fogdon*, the evidence at trial in the Supreme Court as it then was, was ruled inadmissible to the detriment of the Crown. The jury then didn't reach a verdict and the Crown applied and was granted a case stated. When it reached the Court of Appeal, the question facing the Court of Appeal broadly was whether a case stated under the then s.442 of the Crimes Act 1908, which is materially similar to s.380 now, was competent, when there had been no actual verdict.

Elias CJ But hang on a moment. The jury had reached no verdict in that case you say

Cook Yes that's right.

Elias CJ So he was still in jeopardy?

Cook He was but the Court talked about upon what basis can a case stated be launched,

Elias CJ Right.

Cook And this is really suggested by the Solicitor General in his leave submissions where he says that there are two preliminary matters which need to be satisfied before a case stated is competent. Firstly, it's confined to trials which have run their course to actual verdict. That's not an issue in terms of Miss Gordon-Smith's application; and secondly whether the case-stated procedure presupposes that there is – sorry – that the case-stated procedure does presuppose that there's something of a remedy that the Court can apply. The when the majority judgment in *Fogdon*, Sir Michael Myers is going through the provisions, it talks about the machinery in the then s.445, which is now 382, which I referred to earlier, and those machinery provisions provide the remedies and one of those specific remedies is as I referred to just before, a confirmation that that ruling was correct. So in my submission that's determinative of Miss Gordon-Smith's ability to have confident appeal in this Court because pursuant to s.382(2)(a) the Court of Appeal could have confirmed that Justice Fogarty's decision was correct and as they didn't, and this Court can confirm that Justice Fogarty's decision was correct. That's just the long winded way of answering the earlier question that I think His Honour

Justice Tipping that that's the remedy I can put but I can't really take that matter any further.

Elias CJ I suppose it would mean that there's symmetry between the position of the Crown which may in circumstances where the issue with the particular accused is really moot because nothing is going to follow from it. It would put the accused in the same sort of position that they have an interest in vindication of law in the abstract.

Cook Yes Your Honour.

Tipping J This is the position isn't it Mr Cook and you're putting this really well if I may say so that you've got an adverse legal ruling against you in the Court of Appeal, so prima facie you think you could challenge that further, but

Cook I'm sorry Sir I'm just having trouble hearing it and it sounds favourable so I'd like to hear it.

Elias CJ I'm sorry about the sound quality. We'll have to get it investigated.

Tipping J Is the position – can you hear me now?

Cook Yes Sir.

Tipping J Is the position really this that you've got an adverse legal ruling in a case to which you were a party in the Court of Appeal. That's the first step.

Cook Yes Sir.

Tipping J So prima facie you'd think you could appeal that. The only impediment is that it's of no practical significance to you.

Cook Yes Sir.

Tipping J Is that really that in a nutshell?

Cook That is Sir, because I agree with the observation that's implicit in Your Honour's suggestion but Miss Gordon-Smith's going to stay in jail no matter what because she had the favour of the ruling originally.

Tipping J Exactly, yes, thank you.

- Cook But I do say that 382 when it's outlining those remedies in ss.2(a) and in particularly probably 2(f) as well, suggests that a remedy that she could have is the confirmation of that ruling.
- Elias CJ Is the position that is usually taken when appeals are moot, is that a matter of law or legal principle, or is it a factor to be weighed. We tend to treat it as determinative if an appeal is moot, that it shouldn't proceed but I'm just wondering really whether that is so as a matter of legal principle?
- Cook My submission on my feet would be that it's a matter to be weighed and probably a potential rule of thumb is that were the matters to be decided fundamentally important or constitutionally important then the mootness, if I can put it that way, of the appeal is less important.
- Elias CJ I suppose there's also the further consideration that it's rather difficult often to look at a case like this after the event?
- Tipping J I think there are public law cases which say that in spite of mootness inter partes – are you hearing me?
- Cook Yes Sir.
- Tipping J And these are more in the public law field, that in spite of mootness inter partes – the House of Lords I think has said this – that they can, not necessarily that they will, but can assume jurisdiction if it's a point of general importance. I think my brother McGrath knows more about this than I do.
- McGrath J I think that is right, but in the English context Mr Cook there is a procedure known as the Attorney General's reference that you obviously I can see are aware of, which has been recommended for New Zealand by the Law Commission in the structure of the Courts, but it's just one of those recommendations that the Government's never got round to adopting. I'm looking at Mr Mander now. But one could take a step, perhaps a bold step, sideways from the public law cases to say that if there was a really serious public law or point of public importance, this Court would not view mootness as a total bar.
- Elias CJ Well criminal law is public law of course and moreover there's a Bill of Rights Act argument here. I think I would want to look at the cases on this quite closely.
- Cook Yes, that's why I started off really suggesting that the Solicitor General and myself and Dr McCoy are all at a consensus *ad idem* about the importance of this point.

- Tipping J Well I think it's the Gordon-Smith route or nothing frankly.
- Cook Yes Sir, because unfortunately the next submission I'm about to make has made me a pariah in my Chambers which is predominantly defence based and that's this third one and I can put it very quickly. The majority decision in *Grime* saying that 347 is not reviewable is incorrect. I would have felt quite poorly about doing this but for the recent amendment to the Crimes Act which says that it now is reviewable and I suggest that the argument can be brought down to this essential and it's really raised in Justice Savage's dissenting judgment in *Grime* and also to a lesser extent the dissenting judgments of Justice Fair and his brother Judge in the decision of *Fogdon*, and that was that a discharge under s.347 shall be deemed to be an acquittal pursuant to s.347, ss.4, and the case stated procedure is available where the result of the trial is an acquittal. That's pursuant to s.380, ss.4, and my submission really hinges on the back that because the Judge has entered the acquittal, that is of no practical difference than if the jury had found the same thing and that the introduction of the new section 381(a) of the Crimes Act is merely declaratory of the law as it stood. Just one matter of background, because there has been a little bit of confusion
- Elias CJ Sorry, can you just answer me, s.347 no appeal determination is an appeal from – oh I see the case stated does permit the verdict of acquittal on a 347 to be reconsidered?
- Cook No, the majority in *Grime* says that a case stated procedure is not amenable to whether 347 has been entered and that was the suggestion before, I'm sorry I missed which Judge it was from, but that's why there's been the Judge is usually asked to direct the jury to acquit so that then that matter could then be case stated.
- Tipping J This argument depends on us being willing to entertain the appeal on the basis that we will review whether *Grime* was correctly decided?
- Cook Yes.
- Tipping J Yes, that's it really isn't it?
- Cook Yes that's it and I would like if I could to leave it there.
- Tipping J Yes, you are doing this very well Mr Cook.
- Cook Thank you Sir. There's one factual matter that I'd just like to clear up. I don't know whether it's going to be relevant, but Mr King was

discharged, though it was at the close of the Crown case, some defence evidence had been called and it was just interspersed because of witness difficulties.

Tipping J Can't make any difference.

Cook Yes I just

Blanchard J Could you help me counsel by describing again the change that's just been made to the Crimes Act in relation to 347?

Cook Yes, s.381(a) has been introduced, which specifically states leaving no room for doubt that stays or s.347 discharges are now appealable by a prosecutor, whereas before as has been alluded to, the course would have been given the majority judgment in *Grime* to ask the jury to render a verdict of not guilty so that the matter could be case stated.

Blanchard J I suppose that's not retrospective, or if it is that there'd still be the time bar for the Crown?

Cook Yes Your Honour.

Elias CJ Well for my part, I must say I think the lack of symmetry between acquittals entered following a not guilty verdict and acquittals entered following 347 determination is a bit odd, but it would entail reconsidering *Grimes*.

Cook Yes.

Wilson J Mr Cook have you had the opportunity to check the Parliamentary record of the legislation which resulted in 381(a) to see if it cast any light on the reason for the change?

Cook No I'm sorry Sir I haven't. It was part of this whole criminal procedure Bill that has I think introduced the Disclosure Act and

Elias CJ And the double jeopardy. It probably goes with double jeopardy doesn't it?

Cook Yes.

Elias CJ Well thank you very much Mr Cook. Well put, and I'm sorry about the malfunctioning of the equipment. Mr Mander.

Mander Ma'am I'm in the unfortunate situation really of raising the negative aspects and not really offering any solutions.

Blanchard J I'm just wondering whether Mr Cook can hear you.

Cook Yes I can Your Honour.

Blanchard J Good, thank you.

Mander In respect of the recently enacted procedure under 381(a), that would have no application to this case because what can be appealed is the ruling which gave rise to the 347 discharge. Of course in this case the s.347 discharge was not connected to this ruling regarding vetting juries.

Elias CJ Yes.

Mander The only other option – it was one that was raised by my learned friend with me earlier this week – was that the issue could possibly get to this Court by way of a leap-frog appeal in relation to another trial whereby the Crown does vet the jury. The point could be raised before the trial Judge and I would have thought having regard to the Court of Appeal's judgment that it would be a suitable case for the Court of Appeal to be jumped and for the matter to go directly to this Court.

Tipping J The trial Judge would have to follow the Court of Appeal so we know what he or she's going to do, and then come straight here?

Mander Indeed.

Tipping J What do you say about the Gordon-Smith route Mr Mander? Are you able to give us any further assistance on that quite ingenious suggestion?

Mander Well the only difficulty with the Gordon-Smith route, if this Court accepts that Gordon-Smith was a party to the Court of Appeal proceedings then

Elias CJ Well is that in doubt?

Mander Well it could possibly be in doubt in that the Crown couldn't get a remedy through the 380 route

Elias CJ Oh but that's just to say that the Court shouldn't have entertained the matter. She's bound by the ruling isn't she? She was a party to the ruling.

- Tipping J Even if the Court of Appeal had reversed there would be nothing further because she's already been convicted?
- Mander Yes, yes. But if it is accepted that she is and was rather strictly a party to the Court of Appeal proceedings, then under s. 406(a) she was a party, ss.2 of s.406 capital 'I' reads 'with a leave of the Supreme Court a party to proceedings in which the Court of Appeal heard and determined a question referred to in s.380 may appeal to the Supreme Court against the Court of Appeal's opinion'. So reading the section on the fact of it she does have a right of appeal subject to the issue of mootness.
- Elias CJ But that seems to be determinative really, 'subject to the question of mootness', so the only issue would be whether mootness is everything.
- Mander Indeed Ma'am, and whether this Court is prepared to entertain the appeal, having regard to the fact that no practical remedy could be offered to the appellant.
- Tipping J Should that be a bar in all circumstances? I just wonder about the rigidity of that Mr Mander. I know you're being the devil's advocate most helpfully, but I just wonder if that's just clipping this Court's wings unnecessarily.
- Mander Well it may be Sir and indeed to be consistent, the Crown of course brought the initial appeal to get a ruling from the Court of Appeal because of the wider repercussions of His Honour Justice Forgary's decision not to overturn the acquittals of the other two accused.
- Tipping J It's consistent in a sense with the whole philosophy of the case stated procedure that the Crown can put the point of law with the theoretical possibility often only of having a retrial, but usually in my experience, just for the purpose of getting the ruling in practical terms, in a sense there's a consistency in applying that sort of thinking at the next step up.
- Mander Yes with respect I would acknowledge that and there are two features that aren't apparent that perhaps do cause Courts problems. One it's not a hypothetical question because it is obviously a question that runs right across the criminal justice system, and secondly it doesn't turn on any factual matrix as it relates to a particular accused, which I understand appellate Courts often steer away from these types of issues because it does need a factual foundation upon which to make a ruling of law, and it doesn't seem to me to arise in this case.

Blanchard J It's a slightly awkward fit, because the Crown has an ongoing interest because it's got other cases. Miss Gordon-Smith doesn't

Elias CJ Unless she's got

Blanchard J Unless you assume that she's going to commit further crimes, and one doesn't assume that.

Mander Yes I acknowledge that.

Blanchard J Just as a matter of interest, I understand that the Law Commission is doing a wider reference on criminal procedure. Has Crown Law raised with the Law Commission the need to consider inadequacies in the Crown's rights of appeal?

Mander As I understand it, not in relation to this case.

Blanchard J No not in relation to this case but generally. In other words has it been suggested that the Law Commission ought to think about some form of Attorney General's reference?

Mander Not to my knowledge Sir.

Blanchard J Well may I suggest it would be a good idea for that to be put in front of the Law Commission for them to think about?

Tipping J I would endorse that. This goes back into history, but in today's world I think it needs to be balanced out, and again you may not want to put them up for retrial, but you want to get the law sorted out.

Mander No, no, and I have to say Sir from experience that a number of s.380 appeals that I've been involved in have been taken for the purpose of getting a ruling rather than any practical reversal of a decision in the trial Court.

Tipping J And indeed the Attorney General's reference in England I think is expressly based isn't it on the fact that it won't necessarily have any practical result.

McGrath J It cannot have any practical result.

Tipping J That it cannot have any practical result. Well that would preserve the philosophical point which we of course couldn't do as a Court.

Blanchard J And there's a real problem for the Crown that I think is of great public concern and that is that if the Court of Appeal on a conviction appeal

rules against the Crown, the Crown can't take the matter any further. Sometimes it could be a point of considerable significance, yet it cannot come to this Court, and that I think is fundamentally wrong.

- Mander Yes, certainly that has been the subject of some discussion.
- Blanchard J There should be an ability to come further without prejudicing the benefit for the accused of having won in the Court of Appeal.
- Elias CJ Mr Cook is going to be even more unpopular with his Chambers when he goes back and reports this.
- Blanchard J Well he won't necessarily be because there are two sides to be argued on every Attorney General reference.
- Elias CJ It occurs to me that in fact in terms of the formal orders that have been made, if she was a party to a determination which arguably was made against her without jurisdiction, one of the effects of the granting of leave, which is not moot, is a determination by this Court against her. The ruling was ineffective because the Court of Appeal lacked jurisdiction.
- Tipping J Well that's the other side of the coin isn't it? In a sense that covers it both ways. If we say there is jurisdiction then there should be an appeal from it. If there's no jurisdiction we say so.
- Wilson J Mr Mander is the position of Miss Gordon-Smith on mootness practically different in any way from that of an accused whose acquittal is directed by a Judge to preserve the Crown's case stated rights?
- Mander From a practical point of view I don't think it is.
- Wilson J No.
- Elias CJ So it does seem as if *Grimes* should be reconsidered, or at least it's arguable that it's wrong?
- Mander Yes, because the strongest argument to be made that it's right is of course the fact that Parliament saw fit to amend and facilitate that in which the law since *Grime* has held couldn't be the case.
- Tipping J But if we assume jurisdiction despite technical mootness – because I don't think mootness is an absolute legal bar personally, but I'm not sufficiently versed to be confident, then all this business about *Grime* won't really matter.

Mander No Sir, that's right.

Elias CJ One of the things if we were to grant leave, it may be that we would want to identify the issues we would want addressed. It slightly troubled me that the argument didn't extend to a more full-on equality argument, a due process argument, in the Court of Appeal. equivalence which underlies the determination in the High Court and in the Court of Appeal but it doesn't seem to have been fully articulated.

Mander I wasn't counsel involved in the substantive appeal, however I had understood that the respondents did raise the Bill of Rights issues in that context, but I may be wrong.

Elias CJ It seemed the rather narrower point which the Court of Appeal had no difficulty in discussing fairly peremptorily, but one wonders whether there isn't a more fundamental issue there which has exercised the High Court of Australia and of course with their different constitutional arrangements, the Supreme Court, of the areas about equivalence between prosecution and defence.

Mander I've certainly noted that Ma'am.

Elias CJ Well I think we'll have to think about this. Mr Cook was there anything you wanted to add?

Cook No, unless Your Honour, I can confirm that the equality point was raised in the Court of Appeal and there was definitely a lot of written submissions. There wasn't too much orally about the Bill of Rights point which was raised in front of His Honour Justice Fogarty and really forms a linchpin of the argument that we would intend or hope to run if granted leave in this Court.

Elias CJ Yes thank you.

Cook Thank you.

Blanchard J Have we got the *Fogdon* reference?

Mander It appears as a footnote to the Crown's

Blanchard J Well can you just give me the reference please?

Mander Yes Sir. [1985] 2 New Zealand Law Reports at page 265.

Blanchard J Hang on this was supposed to

McGrath J I think it's 1945 New Zealand Law Reports, 380.

Mander I'm sorry Sir, I'm giving you a reference to *Grime*. [1945] New Zealand Law Reports at page 380.

Blanchard J Thank you.

Elias CJ Alright thank you counsel for your assistance. We'll take time to consider how we'll deal with this matter, thank you.

Mander As the Court pleases.

9.52am Court adjourned