

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 51/2019
[2019] NZSC 90**

BETWEEN LANCE PHILLIP NEWING
 Applicant

AND NEW ZEALAND POLICE
 Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: C Mitchell for Applicant
 K L Kensington for Respondent

Judgment: 22 August 2019

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Mr Newing pleaded guilty to driving with excess breath alcohol. He unsuccessfully sought a discharge without conviction and was convicted, fined and disqualified from driving by the Community Magistrate.¹ The discharge was sought on the basis of the effect a conviction would have on his employment.

[2] Mr Newing appealed unsuccessfully against the decision declining a discharge without conviction to the District Court.² Mr Newing's subsequent application for

¹ *New Zealand Police v Newing* [2017] NZDC 16950 (Community Magistrate Cole).

² *Newing v New Zealand Police* [2018] NZDC 5927 (Judge Blackie).

leave to appeal to the High Court was dismissed by that Court.³ He now seeks leave to appeal to this Court direct from the decision of the District Court.

The proposed appeal

[3] Mr Newing seeks leave to appeal directly from the decision of the District Court because the High Court's decision to decline leave is final.⁴ As the respondent submits, there is a question whether this Court has jurisdiction to hear a direct appeal in this case. That question arises because the appeal to this Court would be a second appeal and the relevant provisions state that the only second appeal court is the High Court.⁵ However, we do not need to decide this point because there are no exceptional circumstances that would justify a direct appeal.⁶

[4] The proposed appeal would not challenge the principles applied by the Courts below. Rather, the appeal would be fact specific. No questions of general or public importance arise.⁷ Nor does anything raised by Mr Newing give rise to the appearance of a miscarriage of justice.⁸ The offending was treated as moderately serious reflecting the excess breath alcohol level (707 micrograms of alcohol per litre of breath)⁹ and the fact Mr Newing was stopped because he was speeding and failed to stop at a red traffic light. The evidence as to the consequences of a conviction on which Mr Newing seeks to rely, which was not before the District Court, was considered by the High Court in declining leave.¹⁰

³ *Newing v New Zealand Police* [2019] NZHC 772 (Gault J) [HC judgment].

⁴ Criminal Procedure Act 2011, s 213(3).

⁵ Criminal Procedure Act 2011, ss 238(a) and 254(a). The position may be contrasted in this respect from that before the Court in *Basnyat v New Zealand Police* [2019] NZSC 21 where the Court acknowledged the possibility of a direct appeal from the decision of the High Court to decline an application for a discharge for excess breath alcohol.

⁶ Senior Courts Act 2016, s 75(b).

⁷ Senior Courts Act 2016, s 74(2)(a).

⁸ Senior Courts Act 2016, s 74(2)(b).

⁹ The limit is 250 micrograms of alcohol per litre of breath: Land Transport Act 1998, s 11(a).

¹⁰ Gault J did not consider the evidence was sufficiently cogent and, in any event, was not satisfied that "the consequences of conviction would be out of all proportion to the gravity" of the offending: HC judgment, above n 3, at [29].

[5] The application for leave to appeal is accordingly dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent