

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 113/2018  
[2019] NZSC 21

BETWEEN SHREESH BASNYAT  
Applicant  
AND NEW ZEALAND POLICE  
Respondent

Court: William Young, O'Regan and Ellen France JJ  
Counsel: C Mitchell for Applicant  
K Peirse-O'Byrne for Respondent  
Judgment: 5 March 2019

---

**JUDGMENT OF THE COURT**

---

**The application for leave to appeal is dismissed.**

---

**REASONS**

[1] The applicant pleaded guilty in the District Court to a charge of driving with an excess proportion of alcohol in his blood, but sought a discharge without conviction. This was refused by Judge Ellis, who entered a conviction, imposed a fine of \$800, ordered him to pay costs and medical fees, and disqualified him from driving for six months.<sup>1</sup> He appealed unsuccessfully to the High Court against the refusal to discharge him without conviction<sup>2</sup> and later sought the leave of the Court of Appeal to appeal against the High Court judgment. The Court of Appeal dismissed the application for leave to appeal, albeit the Court also addressed the substantive merits of the appeal.<sup>3</sup> The applicant now seeks leave to appeal to this Court.

---

<sup>1</sup> *New Zealand Police v Basnyat* [2017] NZDC 21099.

<sup>2</sup> *Basnyat v Police* [2018] NZHC 51 (Brewer J) [*Basnyat* (HC)].

<sup>3</sup> *Basnyat v New Zealand Police* [2018] NZCA 486 (French, Cooper and Williams JJ) [*Basnyat* (CA)].

[2] The application for leave to appeal is formally addressed to the Court of Appeal’s decision. This Court, however, has no jurisdiction to hear appeals from a refusal by the Court of Appeal to grant leave to appeal.<sup>4</sup> In the circumstances, we propose to address the application as if it sought leave to appeal direct from the High Court judgment. Such an appeal is possible, but the granting of leave is subject to s 75 of the Senior Courts Act 2016 and requires “exceptional circumstances” to be established. We note, as well, that the application for leave to appeal was filed out of time. No point on this latter issue having been taken by the Crown, we propose to deal with the application on its merits.

[3] The reasons why the applicant sought a discharge without conviction were addressed in considerable detail in the judgments of both the High Court, dismissing his primary appeal, and the Court of Appeal dismissing his application for leave to appeal. A discharge without conviction is not possible unless the court is satisfied that the consequences of a conviction “would be out of all proportion to the gravity of the offence”,<sup>5</sup> a test which is unlikely to be met if neither the offending nor the consequences are out of the ordinary (which, broadly, was the assessment of both the High Court and Court of Appeal in respect of this case).<sup>6</sup> While there may be scope for debate as to how this should be expressed (for instance by use of the words “extraordinary” or “exceptional”), we do not see this case as raising a question of public or general importance. Nor is there any appearance of a miscarriage of justice. And, as well, the s 75 test of “exceptional circumstances” is not satisfied.

[4] Accordingly, the application for leave to appeal is dismissed.

Solicitors:  
Crown Law Office, Wellington for Respondent

---

<sup>4</sup> Criminal Procedure Act 2011, s 213(3).

<sup>5</sup> Sentencing Act 2002, s 107.

<sup>6</sup> *Basnyat* (HC), above n 2, at [29]–[32]; and *Basnyat* (CA), above n 3, at [22], [25] and [27]–[28].