

**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 128/2013  
[2014] NZSC 85**

BETWEEN                      TERRY JONES  
   Applicant  
  
AND                              THE QUEEN  
   Respondent

**SC 27/2014**

BETWEEN                      MARK LEE  
   Applicant  
  
AND                              THE QUEEN  
   Respondent

Hearing:                      3 April 2014  
  
Court:                            Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ  
  
Counsel:                      R M Lithgow QC, A J D Bamford and N Levy for the Applicant  
   Jones  
   G J X McCoy and K J McCoy for the Applicant Lee  
   A Markham and A R van Echten for the Respondents  
  
Judgment:                      4 July 2014

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**JUDGMENT OF THE COURT**

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**The applications for leave to appeal are dismissed.**

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**REASONS**

(Given by McGrath J)

[1]     When a Judge discharges an accused under s 347 of the Crimes Act 1961, or stays a prosecution, the prosecutor may under s 381A apply to the Judge to refer to the Court of Appeal a question of law arising from the Judge's direction. The

applicants, Mr Jones and Mr Lee, seek leave to appeal against the judgment of the Court of Appeal allowing a Crown appeal on such a reference and directing that their trial proceed. This judgment addresses whether the Supreme Court has jurisdiction to entertain such a pre-trial appeal against the Court of Appeal's decision.

## **Background**

[2] Following an undercover investigation of the Red Devils Motorcycle Club in Nelson, the police laid 151 charges against 21 defendants. Ten members of the gang faced charges of participation in an organised criminal group. Other charges concerned offences related to supply of methamphetamine or other drugs, of conspiracy to cause grievous bodily harm and of threatening to kill, and other offences under both the Crimes Act and the Arms Act 1983.

[3] In the course of the investigation, two undercover police officers infiltrated the Club. When suspicion developed about one of them, the police took steps to strengthen his credibility. A fake search warrant, which on its face appeared to have been issued by a court official, was prepared and "executed". The police also prepared and filed criminal proceedings, involving fake charges, against the undercover officer, who was arrested and appeared in court.

[4] Once these events became known, those charged applied to the High Court for a stay of all charges following on from the investigation on the ground that they were so contrary to proper and acceptable police practice that they amounted to an abuse of the courts' process.

[5] In the High Court, Simon France J held that the police conduct raised abuse of process concerns to the extent that it was necessary for the Court to stay the proceedings against all accused.<sup>1</sup> On the application of the prosecutor, the Judge referred a question for the opinion of the Court of Appeal under s 381A:

Was I wrong to stay all prosecutions of twenty-one accused in relation to charges fairly said to flow from the Operation Explorer investigation?

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<sup>1</sup> *R v Antonievic* [2012] NZHC 2686.

[6] The Court of Appeal decided that the High Court Judge had wrongly focused on the fact that the police misconduct constituted an abuse of process, rather than on whether the trial of the accused would be an abuse of process. The Judge had accordingly erred in law. The Court of Appeal set aside the Judge's stay order and directed that the trial should proceed.<sup>2</sup>

[7] Two of the accused persons have applied for leave to appeal to this Court against the Court of Appeal's judgment. Their applications were set down for an oral hearing, at which the Court first heard argument on the preliminary question of whether we have jurisdiction to grant leave to appeal.

### **Statutory provisions**

[8] Section 10 of the Supreme Court Act 2003 sets out this Court's jurisdiction to hear and determine appeals in criminal proceedings. The applicable form of the provision states:

#### **10 Appeals against decisions in criminal proceedings**

The Supreme Court can hear and determine appeals authorised by—

- (a) Part 13 or section 406A of the Crimes Act 1961; or
- (b) section 144A of the Summary Proceedings Act 1957; or
- (c) section 10 or 10A of the Court Martial Appeals Act 1953.

[9] As indicated, the Crown's appeal to the Court of Appeal was brought under s 381A, which appeared in Part 13 of the Crimes Act,<sup>3</sup> and provides:

#### **381A Question of law arising out of discharge under section 347 or stay of prosecution may be referred to Court of Appeal**

- (1) A Judge who directs that an accused be discharged under section 347 or for any reason that a prosecution be stayed may, on the application of the prosecutor, refer for the opinion of the Court of Appeal any question of law arising out of that direction.
- (2) The prosecutor must apply as soon as reasonably practicable after the Judge gives his or her reasons for the direction, and in no case later than 10 days after the reasons for the direction are given.

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<sup>2</sup> *R v Antonievic* [2013] NZCA 483, [2013] 3 NZLR 806.

<sup>3</sup> Part 13 has since been repealed, and replaced by Part 6 of the Criminal Procedure Act 2011. Consequential amendments were also made by that Act to s 10 of the Supreme Court Act 2003.

- (3) When a question is referred to the Court of Appeal, the accused who has been discharged or whose prosecution has been stayed is subject to again being arrested or summoned to appear if the Court of Appeal orders a new trial.

...

[10] There is a lack of symmetry in the expression of s 381A, which permits a prosecutor's appeal to the Court of Appeal but not one by an accused. As well, read literally, neither party is given an express right to appeal to this Court against a Court of Appeal judgment on a question of law relating to a stay direction or discharge of the accused under s 347.<sup>4</sup>

### **The preliminary question**

[11] The applicants' position on the preliminary question is that s 10 gives this Court jurisdiction to hear an appeal by the accused, with the Court's leave. They submit that s 10 was intended to confer on this Court jurisdiction to hear any appeal that, under Part 13, the Court of Appeal has jurisdiction to hear. The Crown submits that s 10 only confers jurisdiction in respect of appeals that are authorised by the statutory provisions listed in the subparagraphs of s 10, in this case Part 13 of the Crimes Act. While s 381A appears in Part 13 it does not expressly authorise a further appeal by either party from the Court of Appeal's decision on a referred question of law nor is it suggested that any other provision does so.

### **Construction of the legislation**

[12] All appellate jurisdiction, including that of the Supreme Court, is statutory. This Court is accordingly unable to grant any application for leave to appeal against the judgment of the Court of Appeal, or other court, unless it is satisfied it has statutory jurisdiction to do so.

[13] Section 10 of the Supreme Court Act is the starting point. It provides that the Court has jurisdiction to hear and determine appeals "authorised by" Part 13 of the

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<sup>4</sup> Counsel did not seek to rely on s 406A of the Crimes Act, which is also referred to in s 10 of the Supreme Court Act. Section 406A provides for a right of appeal to this Court from a decision of the Court of Appeal on a question of law referred under s 406 or s 380. It does not create such a right of appeal from decisions under s 381A.

Crimes Act, and certain other legislation.<sup>5</sup> The natural meaning of the words “authorised by” is that authority for appeals to the Supreme Court is found in the legislative provisions stipulated in s 10.

[14] This meaning is reinforced by s 48 of the Supreme Court Act which together with Part 2 of schedule 1 of the Act made consequential amendments to the Crimes Act, in particular within Part 13. These amendments added provision for appeals to the Supreme Court to certain sections that previously referred only to a right of appeal to the Court of Appeal. For example, s 383A was amended to give a convicted person a right of appeal against a decision made by the Court of Appeal, on an appeal against conviction or sentence, under s 383. The amendments also stipulated an instance where there was no right of appeal to the Supreme Court: s 381 was amended to state that a decision of the Court of Appeal refusing to grant leave to that Court is final.

[15] In relation to pre-trial appeals, under s 379A, the amendments effected by the Supreme Court Act provided for an appeal “to the Court of Appeal or the Supreme Court”. In *Clark v R*, this Court held that this permitted an appeal from the trial court to either the Court of Appeal or the Supreme Court.<sup>6</sup> In the latter case, an applicant for leave would have to meet the “extraordinary circumstances” threshold for direct appeal, under s 14 of the Supreme Court Act.<sup>7</sup> In so holding, this Court said that the amendments to s 379A were carefully constructed, and properly construed did not permit a second appeal to the Supreme Court for a pre-trial determination of the Court of Appeal.<sup>8</sup>

[16] In 2008, in its response to that decision, Parliament enacted s 379AB, which, in explicit terms, gave this Court jurisdiction to give leave to appeal against decisions of the Court of Appeal under s 379A. Section 381A was enacted at the

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<sup>5</sup> Under s 12 of the Supreme Court Act 2003, all such appeals require the Court’s leave and references in other enactments are read subject to the Supreme Court Act’s provision concerning leave.

<sup>6</sup> *Clark v R* [2005] NZSC 23, [2005] 2 NZLR 747.

<sup>7</sup> At [11].

<sup>8</sup> At [12].

same time.<sup>9</sup> In the context of legislative action to clarify the existence of a right of appeal to this Court under s 379A, and against the background of this Court's decision in *Clark*, it is significant that no such right is provided for in s 381A.

[17] Mr Lithgow QC's submission that s 10 has general effect cannot be reconciled with the pattern in Part 13 of the Crimes Act, as amended by the Supreme Court Act and subsequently, of specific provision for rights of appeal to the Supreme Court where they are to exist. The legislative drafting is incompatible with an assumption in s 10 that this Court will have jurisdiction to hear any appeal that the Court of Appeal is able to hear under Part 13.

[18] Mr McCoy submitted there was another way of approaching s 381A. He said that s 10 is to be read as presumptively permitting appeals from all decisions made by the Court of Appeal under Part 13. He argued that only an explicit prohibition in the statute on an appeal from a decision of the Court of Appeal, or a prohibition by necessary implication, could deprive this Court of jurisdiction to hear and determine the appeal. Counsel cited *R v Emmett*<sup>10</sup> and *R v Cain*<sup>11</sup> in support of this proposition. In *Emmett*, Lord Steyn, delivering the judgment of the House of Lords, said:<sup>12</sup>

There is a strong presumption that except by a specific provision the legislature will not exclude a right of appeal as of right or with leave where such a right is ordinarily available.

[19] We do not consider that these authorities assist on the issue of whether the legislation permits us to give leave to appeal. As Ms Markham submitted for the Crown, both *Emmett* and *Cain* were concerned with situations where there was a right of appeal under a statute and the Court had to decide whether the statute also made provision for abrogation of that right in particular circumstances.<sup>13</sup> That is not the situation in the present case where the issue is whether an appeal is authorised at all. The governing principle in the present case is that there is no right of appeal unless it has been conferred by statute.

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<sup>9</sup> Sections 379AB and 381A were inserted on 26 June 2008 by the Crimes Amendment Act (No 2) 2008.

<sup>10</sup> *R v Emmett* [1998] AC 773 (HL).

<sup>11</sup> *R v Cain* [1985] AC 46 (HL) at 55–56.

<sup>12</sup> *R v Emmett*, above n 10 at 781–782.

<sup>13</sup> As noted in Oliver Jones *Bennion on Statutory Interpretation* (6th ed, LexisNexis, London, 2013) at 774.

[20] Two further arguments were raised by counsel for the applicants. First, Mr Lithgow submitted that, in this case, the Court of Appeal had wrongly assumed jurisdiction to hear the appeal because the question it decided was not one of law, as required by s 381A; rather, in substance it was a general appeal. This is the argument that the applicants seek to make on appeal if leave is granted. Mr Lithgow said that this Court could not let stand a decision of the Court of Appeal made without jurisdiction.

[21] Under the Crimes Act, the Court of Appeal has implicit power to decide if a question referred by the Judge under s 381A is a question of law giving it jurisdiction to hear the appeal. If its decision on that point is wrong, it can be corrected on appeal only if there is a right of appeal. It is not, however, an error of jurisdiction, as the Court of Appeal is in that situation acting under its authority to determine whether it has jurisdiction.<sup>14</sup> Furthermore, the importance of an issue cannot of itself create a right of appeal.

[22] The final point raised by Mr Lithgow was that we should conclude that the absence of a right of appeal to this Court was a drafting omission, leaving a gap in the legislation that the Court is able to fill in the course of construction of s 381A, with reference to Parliamentary intention.

[23] It is true that there is a silence in s 381A which is uncharacteristic of Part 13 of the Crimes Act in that there is no reference to either an appeal to the Supreme Court, or the finality of the Court of Appeal decision. We do not accept however that this is an oversight, and that a right of appeal to this Court should be inferred. This would be at odds with the careful construction of amendments to Part 13 of the Crimes Act. Furthermore, s 381A reflects a policy of limitation of pre-trial appeals in criminal matters so that the criminal justice process is administered expeditiously. While that legislative policy is longstanding, it has become less generally applicable over the years, most notably with the enactment in 1966 of provision for pre-trial appeals on admissibility of evidence and other matters in s 379A. But it is reflected in s 381A.

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<sup>14</sup> See *New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer* [1924] NZLR 689 at 707 per Salmond J.

[24] Under the Criminal Procedure Act 2011, there will be rights of appeal to this Court in cases previously covered by s 381A.<sup>15</sup> This is a further movement away from the legislative policy just identified. Mr Lithgow pointed to this new provision as an indication that a right of appeal in the present context is desirable. The Criminal Procedure Act cannot, however, provide a basis for inferring or creating a right of appeal where one does not exist in the Crimes Act. As well, the legislative history of the Criminal Procedure Act indicates that the new provision created a right of appeal where one did not exist before.<sup>16</sup>

[25] Section 381A is expressed to permit a right of appeal only to prosecutors. This is presumably because, without such a right of appeal, the Crown would be unable to have a legal error of the trial Judge in directing a stay or a s 347 discharge, thereby terminating a criminal proceeding, reviewed and corrected by the Court of Appeal.<sup>17</sup> There is no provision for an appeal by an accused presumably because, if convicted at trial, an accused will be able to appeal against conviction to the Court of Appeal and, with leave, to the Supreme Court. While we make no comment on the circumstances of the present case, the ground of appeal advanced by the applicants that there was a miscarriage of justice<sup>18</sup> is capable of embracing situations involving egregious conduct by prosecution agencies. In other words, the policy of s 381A is one of excluding pre-trial appeals only and does not preclude appeals after conviction on the grounds provided for in s 385 of the Crimes Act.

[26] It follows that this Court has no jurisdiction to give the applicants leave to appeal against the Court of Appeal judgment directing that their trial must proceed. Their applications for leave to appeal must accordingly be dismissed.

Solicitors:  
Bamford Law, Nelson for the Applicant Jones  
Christopher B Morrall, Christchurch for the Applicant Lee  
Crown Law Office, Wellington for the Respondents

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<sup>15</sup> Criminal Procedure Act 2011, s 296.

<sup>16</sup> Criminal Procedure (Reform and Modernisation) Bill 2010 (243-1) (explanatory note) at 13.

<sup>17</sup> Until the insertion of s 381A, there was no provision for any appeals against direction that a prosecution be stayed or that an accused be discharged under s 347 of the Crimes Act.

<sup>18</sup> Under s 385(1)(c) of the Crimes Act 1961.