IN THE COURT OF APPEAL AT NIUE

APPLICATION NO: CR 26/09

BETWEEN	JOSEPH MC COY Proposed Appellant
AND	THE CROWN Proposed Respondent

Hearings:	21 February 2011 (Heard at Tauranga, New Zealand)
Coram:	Smith and Carter JJ Savage CJ
Counsel:	C Hirschfeld, for the proposed appellant T Hekau, for the proposed respondent
Decision:	14 March 2011 (9.40am New Zealand time)

APPELLATE COURT DECISION

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[1] The proposed appellant seeks leave to appeal from this Court, in circumstances where there is no appeal as of right.. Article 55A of the Niue Constitution sets out the circumstances where this Court has jurisdiction to hear and determine appeals from a judgments of the High Court of Niue. The decision which the proposed appellant wishes to appeal, does not fall within the specific provisions, but recourse is had to subsection 3 which reads:

> *"Notwithstanding anything in sub-clause (2) of this Article and except where under any Act a judgment of the High Court is declared to be final, the Court of Appeal may in any case in which it thinks fit and at any time grant special leave to appeal from that Court from any judgment of the High Court, subject to such conditions as to security for costs and otherwise as the Court of Appeal thinks fit."*

[2] This matter has a long and unfortunate history stretching back over many years. Mr McCoy was convicted of homicide, he appealed and Chief Justice Hingston on the 15th of November 2006 granted a rehearing. It was granted on the

basis that the record of trial had been destroyed during cyclone Heta and that it was problematic when the Court of Appeal might sit in Niue. In the Chief Justice's view a retrial was inevitable if the record of the first trial was not available for the Court of Appeal. Mr McCoy at that stage agreed to this practical approach and withdrew his appeal.

[3] The subsequent delays and the reasons for them are not particularly germane to the precise and narrow issue that is before us on this application. The application for stay brought by Mr McCoy in 2009 was the subject of a judgment in February 2010 by Isaac J. After considering the matter the application for stay was declined.

[4] The grounds for that application were set out in paragraph 4 of Isaac J's decision they were:

> (a) The Court may so order and for reasons given has the jurisdiction to do so;
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> (b) Witness availability both for the prosecution and defence is limited by death, incapacity or unavailability;
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> (c) Were the rehearing to proceed Mr McCoy would be denied a fair trial given the lapse of time, lack of availability of witnesses, loss of Court records and inability to prepare an adequate defence;
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> (d) The time which has elapsed since conviction is likely to compromise the ability of witnesses who could give evidence to recall the detail of what happened;
>
> (e) Mr McCoy served a substantial period of prison sentence imposed and if the overall delay in this case is unconscionable and would be in breach of Article 11 of the Universal Declaration of Human Rights Act 1948.

[5] After Isaac J's decision there were a series of misconceived steps taken by counsel to prosecute an appeal. It is now before us and it is accepted that Article 55A(3) is the only available course for the Appellant to call this judgment into question. Counsel for Mr McCoy filed a memorandum in December and the Crown responded by a memorandum dated the 31st of January 2011. It is accepted by the parties that this Court of Appeal will deal with this matter on the basis of the record of the Court and the submissions as filed, without appearances for further submissions.

[6] The jurisdiction granted to this Court is purely statutory. It is obviously not intended that in a routine case, special leave will be granted to appeal. It is referred to as special leave and the circumstances in which it is to be granted would have to be special. The concept of special leave to appeal is present in many jurisdictions and the basis upon which such leave is granted is reasonably consistent across them. It is sufficient if we simply refer to the New Zealand precedent.

[7] We repeat that we are not called upon to consider the merits of the appeal but simply to decide whether this particular case meets the criteria for the granting of special leave to appeal.

[8] The decision in New Zealand that has become the touchstone for consideration of whether special leave should be granted is the judgment of the Court of Appeal in Waller v Hider.[1] At 413 Blanchard J said:

> "The appeal must raise some question of law or fact capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of further appeal: *Rutherfurd v Waite* [1923] GLR 34; *Cuff v Broadlands Finance Ltd* [1987] 2 NZLR 343 at pp346-347. In the latter case the Court also remarked that in the end the guiding principle must be the requirements of justice. Further authorities of this Court are cited in *McGechan on Procedure*, para J 67.05."

[9] That is the approach that we take. It should be said at the outset that the decision of Isaac J was orthodox in its approach to the issue. It addressed the law, the facts and gave reasons for not accepting Mr Hirschfeld's view of the facts and did not accept that a factual basis had been established for a stay. In his submissions to us, counsel for Mr McCoy has repeated the facts and the submissions that he made in the Lower Court.

[10] Obviously the crime involved here is of the most serious and delay has been extensive. Be that as it may, those matters were within the purview of the decision by Isaac J. We can ascertain no error of law or error in ascertaining the facts, or in the application of the law to the facts, as would allow us to grant leave.

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[1] [1998] 1 NZLR 412

[11] We are required to look at this issue on a higher level. Here there is no attack on the legal basis of the decision or the principles applied. In a practical sense the facts associated with the delay are not at issue. What is concentrated on by the proposed appellant is in effect, the inferences to be drawn from the primary facts. It is said, basically, that a fair trial is no longer reasonably feasible.

[12] Isaac J has assessed the practicability of a fair and proper trial and no question as would allow for the grant of special leave to appeal arises. On a practical level of course, if the trial is in fact prejudiced, the trial Judge can the deal with that at that point.

[13] Even were we to have decided that a serious question of law or fact exists then, it is doubtful that the case involved some interest public or private of sufficient importance to outweigh the cost and delay of further appeal. The proposed appellant of course is in jeopardy in a criminal prosecution. While that is a private interest of some weight to him it could not be elevated in an objective sense to a sufficient level to move this Court to grant special leave. A public interest of course exists in the despatch of criminal proceedings with sufficient promptness. Many of the cases involved in this deal with the New Zealand Bill of Rights Act 1990 and of course the Universal Declaration of Human Rights Act 1948 as was pleaded before Isaac J. The practicalities of the criminal system in a small jurisdiction have always to be balanced against individual rights. Isaac J dealt with this problem in a considered and learned approach and as we have said the matter remains open until the end of trial.

[14] In his submissions for the proposed appellant, Mr Hirschfeld only cited one decision, that being *Martin v Tauranga District Court.*[2] That was a decision of New Zealand Court of Appeal. It should be noted that the Martin decision has been somewhat modified and considerably amplified by the New Zealand Supreme Court decision; *R v Williams.*[3] That decision was discussed and applied by Isaac J. The Supreme Court ruled that a stay was not mandatory or even the usual remedy for delay. It held it would not be appropriate to stay or dismiss proceedings unless there

[2] [1995] 2 NZLR 419 at 424-425
[3] [2009] 2 NZLR 750

could no longer be a fair hearing, or it would be otherwise unfair to try the accused. Isaac J's assessment of this case was simply that, there could still be a fair hearing and it would not be otherwise unfair to try the accused.

[15] One of the other matters put forward by Mr Hirschfeld is, he claims, there is no indictment presented against his client. It cannot be said that he does not have fair and full knowledge of what he is accused of, and the Crown has responded; we are advised and the information was filed against the Appellant alleging manslaughter on the 4th of April 2009 and it remains on the Court list. The filing of an indictment is a step in the prosecution that must be taken in reasonable time before trial, but we would not expect that it would contain any surprises for the Appellant and his counsel if he has one.

Result

[16] The application for special leave is dismissed.

[17] This trial should be given the highest priority by those involved in the administration of justice in Niue. The trial Judge's inherent power to grant a stay, should the circumstances require it, remains.

Dated at Rotorua, New Zealand this 18 day of March 2011

Smith J

Carter J

Savage C J