

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS, OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA704/2015
[2017] NZCA 101**

BETWEEN PERRY EMMERSON
Appellant

AND THE QUEEN
Respondent

Court: Kós P, Harrison and French JJ

Judgment: 11 April 2017 at 3.00 pm
(On the papers)

JUDGMENT OF THE COURT

The appeals against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Kós P)

[1] Mr Emmerson was convicted in the District Court at Auckland on 23 October 2015 on five counts of sexual offending against a child under 12 years, and three of sexual offending against a child under 16 years. On 18 November 2015 he was sentenced to two years' imprisonment.¹ He is now on parole.

[2] He filed a notice of appeal against conviction and sentence on 8 December 2015. The stated grounds were simply that a miscarriage had occurred as to conviction, and that the sentence was manifestly excessive. The notice advised that

¹ Sections 132 and 134 of the Crimes Act 1961, respectively.

further particularised grounds would be filed once Mr Emmerson had instructed counsel, and that Mr Emmerson might apply for legal aid.

[3] The procedural history is as follows.

[4] First, on 21 March 2016 the Court directed that:

[4] Full particularised grounds of appeal must be filed and served within 14 days of the appellant's legal aid application being decided.

[5] If grounds of appeal are not filed within this time, or the Registrar does not receive notice that the appellant has applied for legal aid within 14 days from date of this minute, the file is to be referred to me for further case management.

[5] Secondly, on 16 April 2016 the Court directed Mr Emmerson be given a 28 day extension. Particularised grounds of appeal would now be due on 14 May 2016. That date passed without compliance or further application. However, on 23 June 2016 the Court was advised Mr Emmerson had been given an interim grant of legal aid in respect of the appeal against conviction.

[6] Thirdly, this Court then extended time for compliance to 25 July 2016. On 25 July 2016 counsel assigned advised the case officer that she was of the view there was no prospect of a miscarriage of justice being found and would inform Legal Aid Services that a full grant was not merited. She advised she would no longer be acting for Mr Emmerson.

[7] Fourthly, on 2 August 2016 the Court directed that particularised grounds, whether in person or by counsel, must be filed within 21 days. On 8 September 2016 Legal Aid Services advised the case officer it had refused Mr Emmerson's application for legal aid.

[8] Fifthly, on 13 September 2016 the Court gave Mr Emmerson what it expressed to be "one final opportunity" to file particularised grounds, to be done within 21 days. If Mr Emmerson did not comply the appeal would be dismissed pursuant to s 338 of the Criminal Procedure Act 2011:

338 Power of appeal court to dismiss appeal for non-compliance with procedural orders

- (1) Despite anything in subparts 2 to 10, an appeal court may dismiss an appeal if the appellant fails to comply with a timetable or other procedural orders fixed for the appeal.
- (2) Before dismissing an appeal under subsection (1), the appeal court must give the appellant 10 working days' notice of its intention to dismiss the appeal.

...

The minute expressly provided that it was notice pursuant to s 338(2) of the Court's intention to dismiss the appeal. On 26 September 2016 Mr Emmerson wrote a lengthy letter to the Court indicating difficulties faced in getting "positive momentum" in this appeal and access to materials.

[9] Sixthly, on 6 October 2016 the Court pointed out that what was required was simply the filing of properly particularised grounds of appeal. That is, the specific grounds on which Mr Emmerson wished to rely in advancing his appeal to this Court. The Court granted a further 21-day period to do so. The minute concluded:

Mr Emmerson must be under no misapprehension that if he fails to file particularised grounds of appeal within 21 days, his appeal will be dismissed.

[10] Yet again Mr Emmerson failed to comply.

[11] On 16 March 2017 the Crown filed a memorandum noting Mr Emmerson's continued non-compliance with the Court's directions. The Crown invited the Court to dismiss the appeal.

[12] Despite invitation, Mr Emmerson has not responded to that memorandum.

Discussion

[13] We have borne in mind the observations of this Court in *Rakuraku v R* that ultimately in exercising the powers in s 338 the question is where the interests of justice lie.² We make these points. First, non-compliance with the Court's directions

² *Rakuraku v R* [2016] NZCA 351 at [25]—[26]. See also *Ellis v R* [2013] NZCA 185.

in this instance has been egregious and extended. More than ample opportunity has been given for rectification. Secondly, we are not satisfied that there is any merit in the current ground of conviction appeal, namely that a miscarriage of justice occurred as to conviction, or that the sentence was manifestly excessive. Thirdly, the interests of justice do not compel the Court to preserve an appeal of no evident merit that the appellant has effectively abandoned. Such an appeal is a needless burden on the complainants, to say nothing of the respondent and the Court.

[14] In those circumstances the appeal will be dismissed pursuant to s 338(1), for repeated failure to comply with procedural orders.

Result

[15] The appeals against conviction and sentence are dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent