NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA199/2020
[2021] NZCA 163

BETWEEN	S (CA199/2020) Appellant
AND	THE DISTRICT COURT AT MANUKAU First Respondent
	THE ATTORNEY-GENERAL Second Respondent

Hearing: 31 March 2021

Court: French, Courtney and Goddard JJ

Counsel: D A Ewen for Appellant
V McCall for Second Respondent

Judgment: 5 May 2021 at 10 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B We make no order as to costs.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] In May 2019 Mr S stood trial on eight charges of sexual and violent offending against his former partner and her new partner. On the third day of the trial Judge G T Winter discharged the jury as a result of concerns arising from the cross-examination of the complainant.[1] With a retrial pending, Mr S applied for judicial review of the District Court Judge's decision to discharge the jury, seeking a stay of the proceeding.[2] Churchman J held that there was no basis on which to have discharged the jury but refused to stay the proceeding.[3] In a separate decision the Judge refused Mr S's application for costs.[4]

[2] At the retrial Mr S was convicted on two of the charges (threatening to kill and male assaults female) and acquitted on the others.

[3] Mr S appeals Churchman J's substantive decision on the ground that the Judge erred in failing to consider granting a declaration, notwithstanding that such relief had not been sought. Mr S also appeals the costs decision. He says that he was substantially successful because the Judge had allowed the judicial review and the Judge's finding of error by the District Court Judge should be regarded as having the same effect as a formal declaration. He applied for leave to amend the statement of claim to plead for declaratory relief against the possibility of the latter argument failing.[5]

[4] During argument it emerged that the costs decision was the real target on appeal because of the financial impact on Mr S. At the end of the hearing, Mr Ewen, for Mr S, agreed that there was no need for us to determine the issues raised in the appeal against the substantive decision. He sought only to have the appeal against the

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1 *R v [S]* [2019] NZDC 14204 [District Court decision].

2 The prayer for relief was framed in terms of "an order in the nature of prohibition in respect of the retrial" or, alternatively, "a permanent stay of proceedings in respect of the retrial". For convenience we refer to the relief sought as that of a stay.

3 *[S] v The District Court at Manukau* [2019] NZHC 2448 [High Court substantive decision] at [47].

4 *[S] v The District Court at Manukau* [2019] NZHC 2824 [High Court costs decision].

5 The application was made even though a pleading for declaratory relief is not a pre-requisite to the granting of such relief: Judicial Review Procedure Act 2016, s 8(3)(d) and High Court Rules 2016, r 5.31(2).

costs decision determined. As a result, it is unnecessary to determine the application for leave to amend the statement of claim.

Background

[5] Even though the appeal is now limited to the costs decision, some explanation of the background to the substantive judicial review application is needed.

The first trial

[6] The charges against Mr S arose from the breakdown of his relationship and related to three incidents during 2017. The charges were laid progressively between August and December 2017: in August 2017 he was charged with two counts of threatening to kill; in September 2017 he was charged with sexual violation by unlawful sexual connection arising from the same incident; in December 2017 he was charged with two further counts of threatening to kill and three of male assaults female. Mr S was remanded in custody until November 2017 when he was granted EM bail.

[7] Progress towards trial was slow for a variety of reasons. A standby date of 14 May 2018 was adjourned to allow the defence time to consider recently provided ESR evidence relating to DNA samples taken from Mr S in relation to the sexual violation charge. The second trial date of 30 July 2018 was adjourned because no courtrooms were available. The next trial date of 10 September 2018 was adjourned because the Crown had provided further ESR evidence and the defence required time to consider it. Two new dates were allocated — priority standby for 10 December 2018 and a firm fixture on 20 May 2019. The December date was vacated because of a lack of courtrooms.

[8] The trial started on 20 May 2019 before Judge Winter and a jury. The central issue was the complainant's credibility. The complainant was presented as law-abiding and rather virtuous, whose main concern was her children. She gave evidence about Mr S that the defence considered to be mere character-blackening. The defence, in turn, sought to portray the complainant in a poor light with the objective of undermining her credibility.

[9] Defence counsel (not Mr Ewen) cross-examined the complainant about the extent of her alcohol consumption while pregnant, following her evidence that she had not drunk heavily during that time. Counsel moved on to ask about screenshots of messages apparently sent by the complainant, which referred to the use of alcohol and cannabis. These messages were previously unknown to the Crown.

[10] There was a discussion in chambers regarding the admissibility of the messages. The Judge considered that, provided it could be established that the messages belonged to the complainant, those referring to alcohol could be put to her. He took a different view on the messages referring to cannabis use. The Crown had made it clear that if that topic were canvassed, then the issue of Mr S's own drug use would be "on the table". Defence counsel conferred with Mr S about whether he wished to pursue those issues and confirmed that he did wish to proceed with that line of questioning.

[11] Cross-examination resumed on the question of the complainant's alcohol consumption during pregnancy. She was then asked about whether she smoked cannabis while pregnant. The Judge gave a warning against self-incrimination and the complainant declined to answer the question. The questioning returned to the issue of alcohol and then moved on to the messages. The complainant confirmed that she had sent them. She expressed concerned as to how Mr S had come into possession of them. Counsel responded by asking "do you think it's concerning that you were talking about smoking cannabis with a 15 year old girl?". The Judge stopped the cross-examination and saw counsel in chambers.

[12] The Judge was concerned about the question being put following the witness's earlier decision to exercise her right against self-incrimination. Defence counsel did not see anything of concern but the Judge and the prosecutor took the preliminary view (pending a review of the transcript) that the trial could not continue. The in-chambers discussion resumed again after the lunch adjournment. The prosecutor applied for a mistrial on the basis that the question was improper and unfair. Defence counsel opposed the application; he considered that he was entitled to put the question and, if the witness wished, she could invoke her right against self-incrimination.

[13] The Judge gave an extensive ruling, in which he concluded that s 22(3)(a) of the Juries Act 1981 was satisfied — there had been a "casualty or emergency [which] makes it, in the court's opinion, highly expedient for the ends of justice" to discharge the jury. Specifically, the Judge considered the messages were not relevant and that lacked a proper foundation. He thought that the unexpected introduction of the material was not predictable and the Crown could not rebut it so as to provide a trial process that respected wider interests.[6]

The application for judicial review

[14] In July 2019 Mr S made his application for judicial review of the District Court Judge's ruling. The statement of claim set out a full chronology of the proceeding, including the fact that the delay from arrest to trial was 650 days and from arrest to the retrial would be 818 days. This delay was alleged to be undue. The relief sought was:

1. An order in the nature of prohibition in respect of the retrial.
2. Alternatively, a permanent stay of proceeding in respect of the retrial.
3. A declaration that:
    i. The appellant's jury trial in the District Court held at Manukau commencing on 20 May 2019 was wrongly aborted by the Trial Judge on 22 May 2019.
    ii. As a result the appellant's trial was unduly delayed.
4. Such further or other relief as the Court deems fit.
5 The costs of and incidental to this proceeding.

[15] Mr Ewen was counsel on this application. He argued that there were no grounds on which the District Court Judge could properly have discharged the jury so that his decision to do so was unlawful.

[16] The Crown supported the District Court Judge's decision to discharge the jury but submitted that even if that decision had been wrong it did not follow that the prosecution should be stayed. It emphasised the extraordinariness of staying a

6 District Court decision, above n 1, at [16]–[18].

criminal proceeding, noting that there had been no undue delay, that the delay had not been egregious and there had been no misconduct by the prosecutor and that there was no prejudice to Mr S, who was in effectively the same position as he had been before the previous trial. The Crown also noted the availability of other relief, including declaratory relief:

> In any event, a stay is not the only way to remedy any error, since the Court may make a declaration if it finds Judge Winter erred, and the applicant has various remedial options as part of the criminal process. He may, for example, seek dismissal of the charges against him under s 147 of the [Criminal Procedure Act 2011], if he considers he is prejudiced by delay or for any other reason; he may seek a reduction in sentence if he is convicted; costs if he is acquitted, and he retains all his post-conviction appeal rights.

[17] Mr Ewen thought that he probably had referred to the Crown's submission regarding declaratory relief in argument before Churchman J but acknowledged that he had not adopted that as a course that should be followed; he was focussed on obtaining a stay.

[18] In his decision, Churchman J referred to the reluctance of the courts to allow judicial review to interrupt the conduct of criminal prosecutions and noted that compelling reasons are required before that would be permitted to occur.[7] Nevertheless he also accepted that where a Judge has misapplied a statutory test, the decision is amenable to judicial review.[8] The Judge went on to consider the basis on which the jury had been discharged and concluded that the cross-examination that led to the decision to discharge the jury was not unexpected; to the contrary it was along the lines of what had been expressly authorised during a previous in-chambers discussion.[9] The Judge concluded that there was no basis on which to have found that a casualty existed for the purposes of s 22(3)(a) of the Juries Act.[10] There is no challenge to this aspect of the Judge's decision.

[19] The Judge then turned to the question of remedy. He recorded that the principal ground relied on for the stay application was delay, with the trial having been

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7 High Court substantive decision, above n 3, at [29] and [35], citing *DGN v Auckland, Manukau, Papakura and Waitakere District Courts* [2015] NZHC 3338, [2018] NZAR 137.
8 At [36], citing *Namana v Wellington District Court* [2012] NZAR 196 (HC).
9 At [45].
10 At [47].

adjourned four times.[11] However, having reviewed the circumstances in which a stay might be granted as explained in *R v Williams*, the Judge found that the delays did not justify a stay of the proceedings and nor did the unjustified abandonment of the trial.[12] In doing so, he was critical of trial counsel, describing aspects of the cross-examination as "very high risk for the defendant" and "risky to the point of recklessness" with the last question being "improper".[13] This aspect of the judgment was criticised in written submissions but, given that the substantive judgment is no longer under challenge, we need not deal with it.

[20] Finally, the Judge turned to the question of relief. He recorded the fact that the only relief that had been sought in the statement of claim was either an order in the nature of prohibition in respect of the retrial or a permanent stay, as well as costs.[14] He then noted:

> [62] For the reasons set out above, although there is a finding that the Court acted without jurisdiction in discharging the jury, the Court declines to stay the proceedings or interfere with the forthcoming retrial.
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> [63] The application for judicial review is therefore allowed but no remedy granted.
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> [64] Just as in the case of *R v Williams*, to the extent that the abandonment of the May 2019 trial has caused delay, that is a matter that may be reflected in the sentence (if the appellant is convicted), or monetary compensation (if the appellant is acquitted).

[21] The Judge concluded by indicating his preliminary view that costs should lie where they fell but inviting a memorandum if Mr S wished to apply for costs.[15]

The retrial and sentencing

[22] Following the discharge of the jury there were difficulties finding dates suitable for all counsel. Eventually the retrial proceeded on 4 November 2019 before Judge Johns. As noted, Mr S was convicted on one charge of threatening to kill and one of male assaults female.

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11 At [50].
12 At [51]–[56], citing *R v Williams* [2009] NZSC 41, [2009] 2 NZLR 750 at [18].
13 At [54].
14 At [60]–[61].
15 At [65].

[23] In March 2020 Judge Johns dismissed Mr S's application for discharge without conviction and instead convicted and discharged him.[16] One of factors the Judge took into account in reaching this outcome was the comments that Churchman J had made in refusing the stay proceeding.[17]

Appeal against the costs judgment

The costs judgment

[24] Mr S applied for costs on the ground that Churchman J's finding that there was no basis on which to discharge the jury constituted an informal declaration in terms of *R v Hansen* (a "*Hansen* indication") that the challenged decision was unlawful.[18] He argued that his position on the judicial review application was thereby vindicated and he should be treated as having been successful for the purposes of costs, albeit liable to having the costs reduced to reflect his lack of success in obtaining a stay.

[25] The Judge did not accept these submissions:[19]

> I acknowledge that the starting point on costs is that "success on more limited terms is still success", and the applicant could be said to have enjoyed some degree of success, in that it was found that the Judge was wrong to abort the trial on the basis of casualty. However, the applicant was unsuccessful in obtaining a stay of the proceedings, which was the main focus of the proceedings, so could not be described as "substantially successful". The manner in which the cross-examination was being conducted meant that, had it continued, the trial might soon have needed to be aborted anyway. As the second respondent noted, the judgment did not state that "the delays occasioned by the unlawful termination of the trial would require redress in due course", but rather that, to the extent that the abandonment of the trial had caused delay, that was a matter that "may be reflected" in either the sentence, were Mr [S] to be convicted, or in compensation, were he to be acquitted. I would not view this as vindication.

[26] The Judge ordered that the costs should lie where they fell.

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16 *R v [S]* [2020] NZDC 8129 [Sentencing notes].
17 At [45].
18 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.
19 High Court costs decision, above n 4, at [7] (footnote omitted).

Appeal

[27] Costs are at the discretion of the court, though the discretion must be exercised in accordance with the principles set out in r 14.2 of the High Court Rules 2016. An appellate court will not interfere with the exercise of the discretion unless satisfied that the "Judge acted on a wrong principle, failed to take into account some relevant factor, took into account an irrelevant factor or was plainly wrong."[20] The relevant principle in this case is that the party who fails pays costs to the party who succeeds (i.e. costs follow the event).[21] This is the position even if the successful party failed on some issues — "success on more limited terms is still success."[22] However, where one party has succeeded overall but failed on a significant issue, the costs payable by the unsuccessful party may be reduced.[23]

[28] Mr Ewen advanced two reasons why Mr S should have been treated as having enjoyed some measure of success and therefore entitled to costs, albeit reduced to reflect the fact that he did not actually secure any relief. First, the Judge allowed the judicial review application. As against this, however, no remedy was awarded. A finding that no remedy should be awarded would usually lead to an application for judicial review being dismissed, and judgment entered for the defendant. The assessment as to whether Mr S was successful must take into account the ultimate outcome, rather than focusing solely on one step in the reasoning that led to that outcome.

[29] The second reason is that Churchman J's finding that the District Court Judge had no basis on which to discharge the jury should be treated as a "*Hansen* indication" so that Mr S is to be regarded as having secured a remedy.[24] We do not accept that the Judge's finding is properly viewed as a "*Hansen* indication".

[30] In *R v Hansen* the Supreme Court considered whether the presumption of supply in s 6(6) of the Misuse of Drugs Act 1975 was inconsistent with the right to be presumed innocent until proved guilty under s 25(c) of the New Zealand Bill of Rights

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20 *Water Guard NZ Ltd v Midgen Enterprises Ltd* [2017] NZCA 36 at [11].
21 High Court Rules, r 14.2(1)(a).
22 *Weaver v Auckland Council* [2017] NZCA 330, (2017) 24 PRNZ 379 at [26].
23 High Court Rules, r 14.7(d).
24 *R v Hansen*, above n 18.

Act 1990 (NZBORA). McGrath J emphasised that where a court has concluded that the measure in question is inconsistent with a protected right, and that no rights-consistent interpretation is available, it must indicate that this is the case, although normally this will be sufficiently apparent from the court's reasoning.[25] In *Attorney-General v Taylor* this Court distinguished a formal declaration of inconsistency with the NZBORA from a *"Hansen* indication", which it defined as:[26]

> a statement in which a court expresses, as part of its reasons, an opinion that legislation limits a protected right in a manner that cannot be justified in a free and democratic society, but does not grant the plaintiff a [declaration of inconsistency] or other remedy.

The Court went on to say that a "*Hansen* indication" may constitute a successful outcome for costs purposes even if no formal remedy is issued.[27]

[31] This case is not analogous to *R v Hansen* and we do not consider that this Court's comments about costs in *Taylor* were intended to apply outside the NZBORA-inconsistent legislation context. To treat the Judge's conclusion as a "*Hansen* indication" would risk cutting across established principles relating to the grant of a declaration in judicial review proceedings that do not raise the particular concerns in relation to the appropriateness of declaratory relief that were addressed in *Hansen*.[28]

[32] The question in this case is whether, realistically, it can be said that Mr S succeeded, even on a limited basis. On one view the Crown succeeded because Mr S did not obtain relief of any kind and therefore he would not be entitled to costs. But even if one took the view that Mr S had been successful in part, we are not persuaded that costs should have been allowed having regard to the ultimate outcome. We agree with the Judge's observation that the application for review was driven by and focussed on the plea for a stay. It is clear from the submissions made on Mr S's behalf in the High Court that the purpose of the judicial review application was to secure a stay of the proceeding. Although the decision under challenge was the discharge of

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25 *R v Hansen*, above n 18, at [253].
26 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [7].
27 At [161].
28 Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at [27.3.3].

the jury and retrial direction, this was only one aspect of the overall submission made to Churchman J that the delay in getting the matter to trial justified a permanent stay:

> The Crown's late run with the forensic evidence occasioned the abandonment of two trial dates and the undue protraction of the proceedings. While on its own this may have justified the termination of proceedings, when taken with the deficiencies and identified errors in the ruling to abort the fifth trial, the case for allowing this review and terminating the upcoming trial is compelling.

[33] The delays in the case had occurred over the course of more than a year — the mistrial in May 2019 was simply the culmination of many delays. A stay could only be (and was only) sought on the basis of the cumulative effect of those delays. The mistrial alone could never have justified a stay.

[34] Mr S's case was entirely different from *Namana v Wellington District Court*, on which Mr Ewen relied heavily.[29] In *Namana*, judicial review was granted in respect of a trial Judge's decision to discharge a jury in purported exercise of an inherent jurisdiction rather than in accordance with the statutory power under s 22 of the Juries Act. The High Court quashed the retrial order because the error in the District Court meant that, at a retrial, the prosecution's position could be improved if the witness whose absence led to the jury being discharged appeared and gave evidence. Mallon J was concerned that the effect of such relief would be that of a stay but considered the position comparable to that in *Gillespie v Christchurch District Court*, where the unwarranted adjournment of a trial had led to the applicant being unable to have a fair trial in the sense that her position could not be restored to what it was at the day of the trial.[30] In this case, however, there was no change in the evidence nor any potential improvement in the Crown case that could be said to have prejudiced Mr S's defence at a retrial.

[35] We make a further observation. We have serious doubts as to the appropriateness of judicial review as a means of securing a stay in the circumstances of this case and strongly discourage its use to challenge decisions made in the course of trial for which there are alternative remedies provided under the Criminal Procedure

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29 *Namana v Wellington District Court*, above n 8.

30 At [39], citing *Gillespie v Christchurch District Court* HC Christchurch CIV-2005-409-390, 17 March 2005.

Act 2011. In this case a stay on the ground of delay could have been sought under s 147 of the Criminal Procedure Act.

[36] Mr Ewen submitted that the judicial review was sought in preference to an order under s 147 for two reasons. The first was that Mr S was not confident that he would receive a sympathetic hearing in the District Court given that he would be relying, in part, on a challenge to the District Court Judge's decision. We do not find that argument convincing. We accept that any application under s 147 would not provide a forum in which to impugn the trial Judge's decision to discharge the jury. But, as discussed, the real basis on which the stay was sought was the delay in coming to trial. That did not require the District Court Judge's decision to be impugned. It simply required consideration of whether the overall delay (which was attributable to a variety of causes) had led to sufficient prejudice to take the extreme step of staying the proceeding. It is apparent from the outcome in the High Court that the position would not have been any different or better had the application been made in the usual way under s 147.

[37] The second reason given for bringing the judicial review proceedings was a perception that Mr S would, if convicted at the retrial, be subject to s 9(1)(k) of the Sentencing Act 2002 which identifies as an aggravating factor:

> any failure by the offender personally (or failure by the offender's lawyer arising out of the offender's instructions to, or failure or refusal to co-operate with, his or her lawyer) to comply with a procedural requirement that, in the court's opinion, has done either or both of the following:
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> (i) caused a delay in the disposition of the proceedings:
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> (ii) had an adverse effect on a victim or witness.

[38] There is, however, no mention of s 9(1)(k) in the submissions made on Mr S's behalf in the High Court. Before us Mr Ewen confirmed that he was not aware of any approach to the Crown to check whether the Crown intended to raise this as an issue. And even if it had been a realistic prospect (which we doubt) the proper forum for determining that question was a disputed facts hearing under s 24 of the Sentencing Act. We do not accept Mr Ewen's submission that such a hearing would not have been possible because it would have required impugning the District Court Judge's ruling. Section 9(1)(k) is clearly directed towards conduct by the defendant. The discharge

of the jury in this case resulted from counsel's cross-examination, which is generally a matter for counsel, not the defendant. It is most unlikely that Mr S would have been at risk of an adverse sentencing outcome as a result of the way counsel elected to cross-examine.

[39] In summary, the Crown was arguably the successful party for the purposes of costs. On that approach, the Judge's decision that costs should lie where they fell was to Mr S's advantage. But even if Mr S were treated as having succeeded in part, it would not follow that he was entitled to costs, having failed to obtain the relief that was the primary objective of his proceedings,[31] and where judicial review proceedings were not the appropriate means of protecting his interests in connection with the criminal proceedings.[32] On that approach, it was still open to the Judge to direct that costs should lie where they fell. However the outcome is characterised we see no error in the Judge's decision that costs should lie where they fell.

Result

[40] The appeal is dismissed.

[41] We make no order as to costs.

Solicitors:
Ord Legal, Wellington for Appellant
Crown Law Office, Wellington for Second Respondent

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31 High Court Rules, r 14.7(d).
32 Rule 14.7(g).