IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA689/2022
[2023] NZCA 291

BETWEEN	SARAH BELL Applicant
AND	NEW ZEALAND POLICE Respondent

Court:	Cooper P, Moore, Fitzgerald JJ
Counsel:	Applicant in person H S Cunningham for Respondent
Judgment: (On the papers)	11 July 2023 at 11.00 am

JUDGMENT OF THE COURT

The application for leave to appeal pursuant to s 339 of the Criminal Procedure Act 2011 is declined.

REASONS OF THE COURT

(Given by Fitzgerald J)

Introduction

[1] Following a Judge-alone trial before Judge Rollo in the District Court, Miss Bell was found guilty of two charges of harassment and one charge of resisting a constable acting in the execution of his duty (the verdicts decision).[1]

[1] *Police v Bell* [2021] NZDC 17810 [Verdicts decision].

[2] The harassment charges arose out of Miss Bell using her personal email and false email addresses to send frequent, unsolicited and at times threatening and insulting emails and text messages to two police employees. The third charge arose out of the execution of a search warrant at Miss Bell's residential address in July 2020.

[3] At trial, Miss Bell denied having sent the relevant text messages and emails. Judge Rollo rejected Miss Bell's evidence as untruthful and unreliable.[2] He found the charges proved beyond reasonable doubt.[3] Miss Bell was directed to come up for sentence if called upon and ordered to pay court costs and emotional harm reparations totalling $1,390.[4]

[4] Miss Bell appealed her convictions to the High Court. The hearing of the appeal was scheduled to take place on 14 December 2022, having been adjourned twice before to accommodate Miss Bell being unable to obtain legal representation and to ensure she had sufficient time to file written submissions in support of the appeal. Miss Bell was warned by the High Court on 17 October and again on 1 December 2022 that if submissions in support of the appeal were not filed in advance of the December hearing date, the appeal would be dismissed.

[5] Miss Bell did not file written submissions in advance of the hearing date. Dunningham J accordingly dismissed the appeal for procedural non-compliance under s 338 of the Criminal Procedure Act 2011 (the Act).[5]

[6] Miss Bell wishes to appeal against Dunningham J's decision to dismiss the appeal. Pursuant to s 339 of the Act, leave to appeal is required. The respondent confirmed that it opposed leave being granted but that it did not request a separate leave hearing. On 13 February 2023, Clifford J directed that the leave application be determined together with the proposed appeal, and that the matter be dealt with on the papers.

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2 At [124].
3 At [149] and [157]–[158].
4 *Police v Bell* [2021] NZDC 25059 [Sentencing notes] at [21]–[23].
5 *Bell v R* HC Dunedin CRI-2021-412-50, 14 December 2022.

Procedural background

[7] We set out below the procedural background in some detail because it provides important context to Dunningham J's decision to dismiss the appeal, and to Miss Bell's application for leave to appeal to this Court.

[8] As noted, Miss Bell faced two charges of harassment and one charge of resisting a constable acting in the execution of his duty.[6] Miss Bell was self-represented at the District Court trial, which occupied a one-day hearing in mid-May 2021.

[9] It is not clear whether Miss Bell was self-represented at trial as a matter of choice. The charges were first called in the District Court on 28 July 2020, when Miss Bell was represented by Mr Noel Rayner. However, he was granted leave to withdraw at an appearance on 10 November 2020. Ms Rhona Daysh was then assigned as counsel but was granted leave to withdraw on 11 February 2021.[7]

[10] Following the Judge-alone trial, the Judge delivered a lengthy reserved decision finding all three charges against Miss Bell proved beyond reasonable doubt.[8] Miss Bell was scheduled to be sentenced on 30 November 2021. Mr Rayner was reassigned to appear as counsel for Miss Bell at sentencing.

[11] Miss Bell then filed three notices of appeal in the High Court. The first appears to have been filed on 16 November 2021. It was said to be an appeal against conviction.[9] Under the heading "Grounds of the appeal", Miss Bell wrote "I am writing to you for further consideration to be given because I have come across further information that wasn't available at the trial".

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6 Harassment Act 1997, s 8 (maximum penalty of two years' imprisonment); and Summary Offences Act 1981, s 23(a) (maximum penalty of three months' imprisonment or $2,000 fine).

7 It appears another lawyer may have also been assigned to represent Miss Bell at some point in 2020. Papers sent by Miss Bell to the High Court Registry included a subsequent complaint by Miss Bell about the lawyer to Legal Aid Services.

8 Verdicts decision, above n 1.

9 The notice of appeal stated that the appeal was filed out of time, but it was filed prior to Miss Bell's sentencing and was therefore within time: s 231(2) of the Criminal Procedure Act 2011.

[12] On 26 November 2021, Miss Bell filed two more notices of appeal. The first was another appeal against conviction. Under the heading "Specify the grounds of your appeal", Miss Bell wrote "There is information to be considered that [was not] available at trial. There's quite [a bit] of information". Under the heading "Does your appeal relate to the admissibility of evidence at trial?", Miss Bell ticked the box marked "Yes", stating "There are complexities involved, it's a tricky prosecution". She also stated "There is information Peter Rollo [has not] even got. It's a frightening experience". She recorded "I have text messages, and statements from MOJ, MOT and MSD … I'd be happy to discuss and scan them to you." Miss Bell requested an oral hearing.

[13] The second notice of appeal filed on 26 November 2021 purported to appeal against sentence. At that time, however, Miss Bell had not yet been sentenced — sentencing being scheduled for 30 November 2021. Similar to the notices of appeal against conviction, and under the heading "Grounds of the appeal", Miss Bell stated "There is information to be considered that [was not] available at trial". The (premature) notice of appeal against sentence accordingly appears to have also been directed to an appeal against conviction.

[14] Miss Bell appeared for sentencing in the District Court on 30 November 2021. In his sentencing notes, Judge Rollo described Miss Bell's communications to the victims of the harassment charges as "a barrage of increasingly aggressive emails, particularly with one of the victims, then worrisome and sinister anonymous emails which implied threats to those officers and their families' safety and wellbeing."[10]

[15] Prior to sentencing, Miss Bell had written apology letters to the victims.[11] The Judge accepted Mr Rayner's submission that the letters – in which Miss Bell demonstrated an awareness of the legitimate concern the victims would have had for their own safety — were "the key" to the sentencing outcome.[12] As noted, Miss Bell was directed to come up for sentencing if called upon within a period of 12 months, and ordered to pay court costs and emotional harm reparations totalling $1,390.[13]

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10 Sentencing notes, above n 4, at [5].
11 Miss Bell now says that Mr Rayner forced her to write the letters.
12 Sentencing notes, above n 4, at [9].
13 At [21]–[23].

[16] Following Miss Bell filing her notices of appeal in the High Court, the High Court Registry advised the parties that the appeal would be heard at the High Court at Dunedin on 24 June 2022.

[17] It appears that Miss Bell anticipated being represented by counsel at the appeal hearing, corresponding with Registry staff about Mr Rayner's contact details. Documents provided by Miss Bell to the Registry also included confirmation from Mr Rayner that a legal aid grant for the appeal had been successful, although limited to a report to be filed by him on the merits of the appeal.

[18] On 1 June 2022, High Court Registry staff emailed the parties reminding them of the forthcoming appeal hearing and the timeframe for filing submissions. Miss Bell's submissions were to be filed no later than 15 working days before the hearing and thus on or before 2 June 2022.[14]

[19] The Registry's communication elicited a response from Mr Rayner, who confirmed that as part of a requirement of an interim grant of legal aid, he had reported to Legal Aid Services on the merits of the appeal. Mr Rayner advised that Miss Bell had subsequently contacted Legal Aid Services and made a complaint about him. He advised the Registry that he could therefore not take matters concerning the appeal any further. Mr Rayner noted that he was not aware whether Miss Bell had been assigned new counsel and provided the Registry with what he understood to be Miss Bell's current contact details.

[20] Communications directly between Miss Bell and High Court Registry staff followed. Miss Bell provided the Registry with various documents and communications she had had with Legal Aid Services, and on 2 June 2022, advised the Registry that she was still awaiting a response from Legal Aid Services about either new counsel being assigned for the appeal or her application for legal aid being declined. Separately, Registry staff received confirmation from Legal Aid Services on 3 June 2022 that the proposed reassignment was still under assessment. It also appears from materials filed by Miss Bell that by late May 2022, she had separately contacted at least 22 lawyers and law firms seeking assistance in representing her on the appeal.

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14 Criminal Procedure Rules 2012, r 8.16(1).

Only nine had responded and none were willing or available to represent Miss Bell. On 12 June 2022, Miss Bell emailed the Registry noting that she had still not heard from Legal Aid Services and requesting "more time, please".

[21] Registry staff brought these developments to Dunningham J's attention, proposing that the appeal be adjourned to the next available date in Dunedin, 17 October 2022. On 14 June 2022, the Crown confirmed that it did not oppose an adjournment. Later that day, Dunningham J issued a minute stating:

> In order to allow the appellant further time to obtain new counsel, whether through legal aid or otherwise, the appeal scheduled for 27 June 2022 is adjourned to be heard on 17 October 2022 at 2.15pm.

[22] On 8 August 2022, the High Court Registry emailed the parties reminding them of the 17 October 2022 hearing date, and the requirement for Miss Bell to file written submissions in support of the appeal no later than 15 working days before the hearing (namely on or before 23 September 2022).

[23] Miss Bell continued to correspond with High Court Registry staff in the lead up to the October 2022 hearing, including in relation to her ongoing efforts to secure legal aid funding or private representation. On 14 October 2022, the Registry emailed Miss Bell reminding her of the hearing on 17 October 2022. That elicited a telephone call from Miss Bell, in which she was advised she would be required to appear on 17 October 2022 despite not being represented by counsel.

[24] On 16 October 2022, Miss Bell sent another email to the Registry providing more information about her attempts to secure representation for the appeal.

[25] Miss Bell did not file written submissions in advance of the October 2022 hearing. On 17 October 2022, the matter was called before Doogue J. In her minute issued later that day, the Judge stated:[15]

> [3] The appellant is self-represented and wishes to be known as Sarah Bell for the purposes of this appeal. The appeal grounds, such as the Court is able to glean, are:
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> (a) the trial did not end truthfully;

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15 *Bell v Police* HC Dunedin, CRI-2021-412-50, 17 October 2022.

(b) there is fresh evidence that was not available at the time of the trial; and

(c) the Judge came to conclusions that were not reasonable on the facts.

[4] The respondent opposes the appeal.

[5] Sarah Bell has been unable to retain the services of a lawyer. It seems a lawyer (John Rayner) whose services she did manage to retain at an earlier time advised Legal Aid Services there was no merit in Sarah Bell's appeal. Mr Rayner is no longer prepared to act for Sarah Bell.

[6] Since then I am satisfied that Sarah Bell has actively been trying to engage the services of another lawyer. Sarah Bell informed the Court that she has had to look at obtaining the services of a lawyer from another centre as it appears no Dunedin-based lawyer wishes to act in this matter. Sarah Bell has been in contact with an Auckland-based lawyer over the last 72 hours and it is hoped that lawyer will be able to take instructions and file the necessary submissions in support of the appeal.

[7] Given the nature of the case and the current deficits in compliance with the requisite rules pertaining to criminal appeals in this Court, I invited Crown Counsel, Mr Bates, to address me on whether or not this appeal should be struck out on the ground that it has not been prosecuted expeditiously.

[8] Mr Bates submitted that in his view fairness and the need to be seen to be fair meant the appeal should be adjourned today, as it is the first call of the matter and Sarah Bell did appear in person. However, he submitted it should be made very clear that only one more opportunity will be made available for Sarah Bell to retain a lawyer and appear at the next call either with them or, in the absence of a lawyer, to proceed to argue the appeal.

[9] Given that Sarah Bell has had since June to retain a lawyer, I consider one more month is long enough for that to occur and for either that lawyer to file the requisite submissions or for Sarah Bell to do that in the event she is unable to retain a lawyer's services.

[10] I have advised Sarah Bell today that unless submissions are filed within that period of time the appeal be struck out for want of prosecution.

[11] The appeal is to be adjourned to a date no earlier than one month hence.

[26] Based on [9] of Doogue J's minute, Miss Bell was to file her submissions within one month of 17 October 2022, and accordingly no later than around 17 November 2022.[16]

[16] It would have been preferable for the minute to specify an actual date by which Miss Bell was to file her submissions. Nevertheless, the minute was clear as to the need to do so well in advance of the appeal hearing and the consequences of not doing so.

[27] The Registry subsequently advised the parties that the appeal would be heard on 14 December 2022.

[28] On 17 November 2022, Registry staff emailed Miss Bell reminding her of her obligation under the Criminal Procedure Rules to file written submissions in support of the appeal no later than 15 working days before the hearing. This would have required Miss Bell's submissions to be filed on or before 23 November 2022, which was later than directed by Doogue J. Given the Registry's advice, it was not unreasonable for Miss Bell to proceed on the basis that the time period for filing submissions has been extended to 23 November 2022.

[29] Miss Bell did not file submissions on or before 23 November 2022, or at any time prior to the 14 December 2022 hearing.

[30] On 29 November 2022, Miss Bell corresponded again with the Registry, updating staff on her continuing attempts to secure a lawyer. Miss Bell's email stated, among other things:

> For quite some time, I have had every door of communication close on me, leaving me with no way forward with this. No one wants to help me with this, and I have angered quite a few people in the process. No one wants to act as an advocate for me on this matter.

[31] On 1 December 2022, the Registry advised the parties of the following directions from Dunningham J:

> This appeal is to be called on 14th December 2022.
>
> The appellant is [reminded] that pursuant to [s 338] of the Criminal Procedure [Act] 2011, the appeal will be dismissed at that callover if submissions have not been filed in advance of the date, as was notified in [Doogue J's] minute of 17th October 2022.

[32] On 12 December 2022, Miss Bell corresponded with counsel appearing for the Crown on the appeal, copying in High Court Registry staff. Miss Bell stated:

> Since October 2022, when I actually met you, I have taken advice by the high court staff, and I have been engaging with a lawyer, who I have been speaking with, in Auckland. When you left, I crossed paths with and had a quick chat to a woman, whose eyeliner was perfect. Her words were "start today", which I did.

> When Noel represented me, he wrote to me, please see attached, saying the high court had asked how things were progressing. Noel also wrote to me saying the high court [preferred] that I have a lawyer to act for me.
>
> I wrote to legal aid, once again, this morning, for the fifth time, over all, asking them to please reconsider my reconsideration application to be assigned a lawyer at random, I sent the same attachment that I have attached for you here. I explained to legal aid in an email that the high court have said they are satisfied that I have had difficulty in retaining a lawyer to actually represent this matter for me. Further to that, the high court have allowed the appeal application to proceed on the basis of fairness and the need to be seen to be fair. I am yet to hear back from legal aid, still. The minute I got on 17 October 2022 is correct; it appears that no Dunedin based lawyer wishes to act in this matter. Good news, for the high court, includes, that *one* lawyer is interested in the matter, and he is based in Auckland, and has a genuine interest. He told me, he has questions that the high court would be interested in hearing. He also said that the work needed, involved quite a few hours of looking into the microscopic finer detail that, he believes, the district court have missed. My lawyer friend has gone through a good chunk of what I got from Rebecca Hill; all the while, sick. The lawyer I have been speaking to, gotten to know, and have become quite respectfully fond of, is sick with covid-19. Until he is better, and in a better state, there is simply nothing more I can do. I have achieved what the high court wanted; I have caught someone's attention. It's just that, [he is] sick, for the time being, with covid-19.
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> Robin, the minute on 17 October 2022 is correct, the reasons I have filed the appeal application, all three of them, are, the trial did not end truthfully, there is fresh evidence that was not available at the time of the trial, and the judge came to conclusions that were not reasonable on the facts. I would never have filed the appeal application if the trial concluded truthfully, and if all evidence was available at the time of the trial, and the judge came to conclusions that were reasonable on the facts. It would have been fair.
>
> I spoke to my Auckland lawyer friend this morning, and he has said to me that I have done what the high court … asked me to do, so for [the] time being, he said, there is simply nothing more I am able to do. He has told me not to panic, in the meantime.

[33] On 14 December 2022, the matter was called before Dunningham J.[17] The Judge issued a minute the same day stating:[18]

> [2] The appeal was first scheduled to be heard on 17 October 2022. However, [Miss] Bell had not filed submissions, nor had she managed to arrange the services of a lawyer. Doogue J issued a minute adjourning the appeal to allow [Miss] Bell to have time to retain a lawyer or, in the absence of a lawyer, to prepare to argue the appeal herself. She directed [Miss] Bell to file submissions in advance of the rescheduled hearing date. She warned that if that direction was not complied with, the appeal would be dismissed.

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17 It is not clear from the papers whether Miss Bell appeared in person at the hearing.

18 *Bell v R*, above n 5.

> [3] The appeal was rescheduled for hearing today 14 December 2022, and on 1 December 2022, I issued a further minute warning [Miss] Bell that if submissions were not filed in advance of that date, then pursuant to s 338 of the Criminal Procedure Act 2011, her appeal would be dismissed. No submissions were filed in advance of today, nor was an explanation for that omission filed in advance of today. Accordingly, the appeal is dismissed.

[34] We pause to note two points:

(a) First, Dunningham J's reference to the appeal being first scheduled to be heard on 17 October 2022 is not correct, given the appeal was first scheduled to be heard on 24 June 2022.

(b) Second, it is not clear whether Dunningham J was aware of Miss Bell's email to the High Court Registry on 12 December 2022 (see above at [32]). That email did not, however, address why Miss Bell had not taken steps herself to prepare and file submissions in support of the appeal, irrespective of her legal representation.

[35] Following the appeal being dismissed, Miss Bell filed a notice of application for leave to appeal with this Court. Under the heading "Is any lawyer now acting for you?", Miss Bell wrote "Not yet. I keep asking legal aid to please assign me to someone. Advise to date is to keep asking legal aid and assign me to someone." In response to the question "Why should the court give you leave to appeal?", Miss Bell wrote:

> There's a great deal of importance with this application to the Court of Appeal. I have information only a lawyer is able to handle because there has been a terrible miscarriage of justice. I have told the courts already things have been said that simply are not true. A judgment has been made that is, also, simply not true. There is, also, information that [was not] available at the trial, that court will be interested in. The Ministry of justice have provided their support for this matter too[.]

Legal principles

Dismissal of an appeal for procedural non-compliance

[36] The power to dismiss an appeal for procedural non-compliance is contained in s 338 of the Act. It provides:

> **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.
>
> (3) The appeal court must not dismiss an appeal under subsection (1) if the appellant, after having been given notice under subsection (2), rectifies the non-compliance within the notice period given by the court.
>
> (4) A reference in any enactment other than this section to the abandonment of an appeal under this Act must, unless the context otherwise requires, be read as including a reference to a dismissal under subsection (1).
>
> (5) In this section, **appeal** includes an application for leave to appeal.

[37] Section 338 accordingly applies if three pre-requisites are met:

(a) first, the appellant has failed to comply with a procedural order or timetable;[19]

(b) second, the appeal court gave the appellant 10 working days' notice of its intention to dismiss the appeal;[20] and

(c) third, the appellant failed to rectify the non-compliance within that period.[21]

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19 Section 338(1).
20 Section 338(2).
21 Section 338(3).

[38] In *Mitchell v Police*, this Court explained that in circumstances where the three pre-requisites of s 338 are met:[22]

> [29] The appeal court then has a discretion to dismiss the appeal for non-compliance under s 338. The discretion is guided by the interests of justice, balancing the right of appeal affirmed by s 25(h) of the New Zealand Bill of Rights Act 1990 (NZBORA) with Parliament's intention when enacting s 338. In other words, the right to appeal is not untrammelled. Finality, particularly for victims, is also important.
>
> [30] These principles were discussed by this Court in *Rakuraku v R*. In considering the limits of the right affirmed by s 25(h) of the NZBORA, this Court observed that the power to dismiss an appeal for non-compliance recognises that there are countervailing considerations relevant to the interests of justice including the Crown's legitimate expectation that it should be provided with adequate particulars of the grounds of appeal to enable a proper response and the public interest in the finality of court proceedings. The orderly and efficient administration of the court is also a relevant consideration although an appeal would not normally be dismissed under s 338 unless there had been serious, repeated and continuing non-compliance with the court's directions.

[39] The Court also emphasised that s 338 requires a separate judicial consideration following the act or acts of non-compliance.[23] Finally, the Court addressed the correct process to be followed by an appeal court when making the final decision to dismiss an appeal for non-compliance, and in particular, whether a further hearing for that purpose is required. The Court did not consider that to be necessary, stating:[24]

> [42] … In our view, given the scheme and purpose of the legislation as discussed in *Rakuraku* a further hearing is not necessarily required but that option would be available to a court if considered appropriate in the circumstances.
>
> [43] As already mentioned, what is however required is a separate judicial determination. The Judge should consider the extent of the non-compliance and any other material relevant to the exercise of the Court's discretion under s 338 including any reasons for non-compliance. The decision should then be recorded in the form of a brief judgment with reasons.

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22 *Mitchell v Police* [2019] NZCA 497 (footnotes omitted).
23 At [41].
24 At [42]–[43].

Appeal against dismissal of appeal for procedural non-compliance

[40] Section 339 of the Act provides a right of appeal (with leave) against a decision to dismiss an appeal under s 338:

> **339 Appeal against dismissal under section 338**
>
> (1) An appellant may, with the leave of the relevant appeal court, appeal to that court against a dismissal of an appeal under section 338.
>
> (2) The relevant appeal court is—
>
> (a) the High Court, if the appeal is against the dismissal of an appeal under that section by the District Court; or
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> (b) the Court of Appeal, if the appeal is against the dismissal of an appeal under that section by the High Court; or
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> (c) the Supreme Court, if the appeal is against the dismissal of an appeal under that section by the Court of Appeal.
>
> (3) An appellant commences an appeal under this section by filing a notice of application for leave to appeal in the relevant appeal court.
>
> (4) A notice of application for leave to appeal must be filed within 20 working days after the date of the dismissal appealed against.
>
> (5) The relevant appeal court may, at any time, extend the time allowed for filing a notice of application for leave to appeal.
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> (6) The relevant appeal court must determine an appeal under this section by either—
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> (a) dismissing the appeal; or
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> (b) allowing the appeal and remitting the matter to the court appealed from with any directions it considers appropriate.
>
> (7) The determination of an appeal by the relevant appeal court under this section is final.

[41] The proper approach to an appeal pursuant to s 339 was also addressed in *Mitchell*. This Court summarised the relevant principles as follows:[25]

> (a) It is for the applicant to establish that leave to appeal should be granted.
>
> (b) Leave to appeal under s 339 involves a challenge to a discretionary decision (except when the applicant can show that one of the three statutory pre-requisites was absent). Thus, leave to appeal requires

[25] At [32] (footnotes omitted).

> the applicant to show that the Judge erred in principle, gave weight to extraneous or irrelevant matters, failed to give sufficient weight to relevant considerations, or was plainly wrong.
>
> (c) It is not enough for an applicant to simply establish that the dismissed appeal may have merit. It is the decision to dismiss for non-compliance, and not the conviction and/or sentence, which is challenged.
>
> (d) Therefore, to obtain leave, the applicant must establish an arguable case that the discretion under s 338 was wrongly exercised.

[42] It is helpful to elaborate on the point made at (c) above. As this Court observed in *Rakuraku v R*, prior to the introduction of the Act an appeal court had no power to dismiss an appeal without consideration of the merits.[26] Section 338 of the Act changes that approach, in that an appeal can be dismissed merely for procedural non-compliance. That said, we would expect that in most cases where a court is considering dismissing an appeal for procedural non-compliance, it will undertake a provisional or high-level assessment of the merits of the proposed appeal. For example, in *Rakuraku*, and despite observing that s 338 empowers a court to dismiss an appeal without considering the merits, this Court nevertheless endeavoured to make some assessment of the prospects of success of the appeal.[27] We accept however, that as in this case, the procedural non-compliance may make an assessment of the merits, even on a preliminary basis, difficult.

Submissions

Miss Bell's submissions

[43] Miss Bell filed a four-page document which we take to be her submissions in support of the application for leave to appeal (and appeal).

[44] Miss Bell explains the difficulties she faced in representing herself in the District Court trial and states that she did as she was asked to do by the High Court, namely to take steps to secure representation by a lawyer. Miss Bell further states:

> I have made a promise to court that the appeal is necessary to be heard. A high court judge believed that the trial did not end truthfully, there is information

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[26] *Rakuraku v R* [2016] NZCA 351 at [25], referring to *Petryszick v R* [2010] NZSC 105, [2011] 1 NZLR 153.

[27] At [30].

> that was not available at the time of the trial, and the district court came to conclusions that were not reasonable on the facts.

[45] Miss Bell submits that to be granted the opportunity to argue the appeal "would be beneficial in the names of *fairness* and *the right to be heard*". She records that she has more recently received legal advice from two lawyers, though there is no suggestion they are prepared to act for Miss Bell on the proposed appeal. Miss Bell reiterates the difficulties in representing herself in the District Court and the view that "the proper legal processes of investigation, as noted by sources, were not actually carried out properly or correctly. Court and I appear to have conflicting information." One example of this is said to be differences between the formal statements the District Court had and those Miss Bell had. Miss Bell also relies on a communication between herself and GS (one of the victims on the harassment charges) on 1 December 2022 (in what Miss Bell says was GS's "professional capacity"), about what Miss Bell describes as "a family harm scenario I had tended to".

The respondent's submissions

[46] Counsel for the respondent, Mr Cunningham, submits the three prerequisites to dismissing an appeal pursuant to s 338 were met and Dunningham J therefore had jurisdiction to dismiss the appeal:

(a) Miss Bell failed to comply with Doogue J's procedural order to file submissions within a month of 17 October 2022.

(b) After the one month expired, the High Court gave Miss Bell more time. Dunningham J reminded Miss Bell she needed to file submissions or else have the appeal dismissed ahead of the 14 December 2022 fixture.

(c) Miss Bell did not file submissions in time, and no submissions have ever been filed.

[47] Mr Cunningham further submits that Dunningham J did not err in exercising her discretion to dismiss the appeal, in that Miss Bell was given multiple extensions of time, totalling approximately five months, to comply with procedural directions. Mr Cunningham emphasises that Miss Bell was directed by two separate court

minutes of the need to file submissions and advised of the consequences of not doing so, but has not explained on the current application why the decision to dismiss the appeal in those circumstances was wrong. Mr Cunningham further submits that Miss Bell was plainly capable of filing submissions, as she is able to write clearly and logically when minded to do so. Mr Cunningham says that nothing in the voluminous materials filed by Miss Bell in support of the application for leave, which tend to repeat matters covered at trial, answers these points.

[48] In terms of the merits of the proposed appeal, Mr Cunningham submits that there is no basis for the suggestion the Judge's verdicts were unreasonable, noting that the verdicts decision carefully and fully traversed the evidence given at trial. Further, Mr Cunningham notes that Miss Bell appeared to acknowledge her guilt in the apology letters provided to the Judge ahead of sentencing, one of which stated, "… I am deeply sorry for what you have dealt with, and the impact emails, of a violent nature, can have on a family".

Discussion

[49] We are not satisfied that leave to appeal ought to be granted. We have reached this conclusion for the following reasons.

[50] First, we are satisfied the three statutory prerequisites to dismissing the appeal under s 338 were met. Miss Bell failed to comply with the requirement to file written submissions in advance of the original appeal hearing in June 2022. This led to the adjournment of the hearing until October 2022. Miss Bell failed to comply with the requirement to file written submissions in advance of the October 2022 hearing. This led to the adjournment of the hearing until December 2022. We appreciate that during this time Miss Bell was trying to obtain the services of a lawyer to assist in handling her appeal. We do not consider those procedural failures alone would have warranted the dismissal of the appeal.

[51] However, on 17 October 2022, Miss Bell was given a further opportunity to prepare and file written submissions on the appeal. They were to be filed within one month of Doogue J's minute of 17 October 2022. Miss Bell did not comply with that

direction. Nor did she comply with the Registry direction of 17 November 2022 which effectively gave Miss Bell further time to file submissions.

[52] Turning to the requirement to give an appellant 10 working days' notice of the appeal court's intention to dismiss the appeal, excluding 14 December 2022 itself, Dunningham J's minute of 1 December 2022 was issued only nine working days prior to the appeal being dismissed. However, this must be viewed in the context of Doogue J's earlier direction of 17 October 2022 that if Miss Bell did not file her submissions within one month, the appeal would be struck out for want of prosecution. While Doogue J's minute did not refer to s 338, Miss Bell had significantly more than 10 working days' notice of the High Court's intention to dismiss the appeal in the event submissions were not filed.

[53] Finally, there is no dispute that Miss Bell did not remedy the procedural default by filing submissions prior to 14 December 2022.

[54] Dunningham J accordingly had jurisdiction to dismiss Miss Bell's appeal. While the Judge's reasons for doing so are brief (and do not reflect the recommendation in *Mitchell* that a short judgment be prepared),[28] the basis for her reasoning is clear enough and we do not consider she erred in exercising her discretion. The combined effect of Miss Bell's procedural defaults referred to at [50]–[51] above were serious and ongoing — they led to the abandonment of two substantive fixtures, and it is inevitable that the 14 December 2022 fixture would also have had to be adjourned even if the appeal had not been dismissed. It would have been quite unfair to have required the respondent to participate in the appeal without any clarity as to the grounds of Miss Bell's appeal or the benefit of any written submissions in support of it. In the context of successive abandonments of scarce court hearing time, the orderly and efficient administration of the High Court is also relevant to the discretionary exercise.

[55] We agree with the Judge that there was no satisfactory explanation provided by Miss Bell for her ongoing procedural default. As noted, it is not clear if the Judge was provided with copies of all Miss Bell's communications with the Registry,

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[28] *Mitchell v Police*, above n 22, at [43].

including her email of 12 December 2022. Nevertheless, the Judge was plainly aware that Miss Bell remained unrepresented, and the difficulties in obtaining representation did not excuse the ongoing failure to file written submissions in any event. Miss Bell was also on clear notice from two High Court judges of the need to file written submissions prior to the December 2022 hearing irrespective of her representation, and of the consequences of not doing so.

[56] The Judge did not consider the merits of Miss Bell's appeal. For the reasons explained earlier, that itself does not amount to error. We have nevertheless endeavoured to assess, at a high level, the prospects of success of the appeal.

[57] Despite the further information Miss Bell has filed with this Court, it remains difficult to discern the basis upon which she says the Judge was wrong to reach the verdicts he did. The Judge's verdicts decision contains a detailed analysis of the evidence given at trial. A key issue for determination was whether Miss Bell sent the emails in question. Miss Bell denied that she did, but the Judge dismissed her evidence as untruthful and unreliable.[29] An appeal court is hesitant to interfere with a trial judge's assessment of credibility.[30] Further, the Judge accepted the prosecution's expert evidence as to the authorship of the emails,[31] which traced the emails back to a laptop found in Miss Bell's possession at the time the search warrant was executed. Miss Bell suggested at trial that it was possible that, unbeknownst to her, some other person had hacked the laptop to send the emails to the complainants of the harassment charges. The Judge found that there was no evidential foundation for such a possibility.[32]

[58] We have also considered the further matters raised by Miss Bell and the various documents she has filed. It is unclear how much of that material relates to the application for leave, or to the appeal. We apprehend, however, at least three matters which Miss Bell would want to advance before the High Court were her application for leave to appeal and appeal to this Court to be granted.

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29 Verdicts decision, above n 1, at [124].
30 *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 at [31].
31 Given by a New Zealand Police digital forensics analyst.
32 Verdicts decision, above n 1, at [80].

[59] First, Miss Bell says that some of the prosecution's formal statements are untruthful. She refers to GS's formal statement in which he said "I spoke with my [diversity liaison officer] at the time about [Miss Bell] and I was informed to tread carefully as [Miss Bell] did not have a good reputation with the LGBTQ [community] and was typically going against what the community was trying to achieve". As evidence that this statement is untrue, Miss Bell refers to:

(a) an email from the team leader of the Criminal Records Unit of the Ministry of Justice, confirming that Miss Bell had contacted the Criminal Records Unit on several occasions from September 2020 about the limited gender options on the "Request your own criminal conviction history check" form, and that in April 2021, the Ministry had added a gender option to the form; and

(b) a letter from the Ministry of Social Development | Te Manatū Whakahiato Ora dated 15 August 2019, thanking Miss Bell for "advocating for changes to our systems".

[60] These matters do not mean GS was untruthful in his formal statement. What he recorded may well have been what he was told by his diversity liaison officer. In addition, Miss Bell had every opportunity to challenge GS's evidence on this issue at trial. The Judge also referred to evidence that Miss Bell had interacted successfully with other government departments about gender identity and diversity in any event.[33]

[61] Miss Bell also appears to take issue with the formal statement of a senior police inspector in which she suggests that from a certain point in 2020, Miss Bell did not continue to engage with a police sergeant who had been nominated as a single point of contact for her. We cannot see how this is relevant to the issues that arose for determination at trial, and again Miss Bell was able to cross-examine the witness on this point in any event.

[62] The second matter Miss Bell raises is that the prosecution computer analysis evidence that attributed the emails to her was not tested at trial by a defence expert.

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33 At [30].

While that is correct, Miss Bell had the opportunity to call evidence on that topic, and nothing has been put before us, or the High Court, to suggest that the prosecution expert evidence might be wrong. Further, in the apology letters written to the victims for the purposes of sentencing, Miss Bell appears to acknowledge responsibility for sending the emails.

[63] Third, Miss Bell refers to a communication said to have taken place between her and GS on 1 December 2022.[34] We presume she refers to this (and other communications between herself and the Police after the trial concluded, which Miss Bell characterises as being "professional" and "work related") to call into question whether she was the author of the emails that were the subject of the harassment charges. While communications such as these were not available at the time of trial, they are not cogent, in terms of demonstrating that Miss Bell could not have been the author of the earlier emails.

[64] Finally, Miss Bell states in her submissions that a High Court Judge has agreed that the District Court trial "did not end truthfully".[35] This appears to be a reference to Doogue J's minute of 17 October 2022. That is not a correct characterisation of the Judge's minute. Doogue J was simply recording Miss Bell's position that the trial had ended untruthfully.

[65] Standing back, and assessing the matter as best we can in the circumstances, we do not discern any real merit to Miss Bell's proposed appeal.

[66] We are therefore satisfied that Dunningham J did not err in dismissing the appeal pursuant to s 338(1) of the Act.

Result

[67] The application for leave to appeal pursuant to s 339 of the Criminal Procedure Act 2011 is declined.

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34 See above at [45].
35 See above at [45].

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