IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA408/2025
[2026] NZCA 203

BETWEEN	ROGER WILLIAM O'BYRNE Applicant
AND	THE KING Respondent

Court: Whata, Grice and Walker JJ

Counsel: Applicant in person
I A A Mara for Respondent

Judgment: (On the papers) 28 May 2026 at 11.00 am

JUDGMENT OF THE COURT

The application for leave to bring a second appeal against sentence is declined.

REASONS OF THE COURT

(Given by Grice J)

[1] Mr O'Byrne was convicted of wilful damage[1] after a judge alone trial in the District Court.[2] He was subsequently sentenced on 11 September 2024 to pay "actual reparation" of $4,221.37 and emotional harm reparation of $1,000 as well as court

1 Summary Offences Act 1981, s 11(1)(a). Maximum penalty of three months' imprisonment or a fine not exceeding $2,000.
2 *R v O'Byrne* [2024] NZDC 5720.

costs.[3] Mr O'Byrne's appeal against sentence to the High Court was dismissed.[4] He now seeks leave to bring a second appeal against his sentence.

[2] Any appeal from a conviction following a judge alone trial in the District Court is to the High Court.[5] While Mr O'Byrne lodged a notice of appeal against conviction in this Court, we have no jurisdiction to deal with it. This was pointed out to Mr O'Byrne in a minute dated 13 August 2025,[6] and we do not deal with it further.

[3] Mr O'Byrne and the victim were neighbours in rural North Canterbury. On 13 February 2022, due to heavy rainfall associated with Cyclone Dovi there was surface flooding in the area. Mr O'Byrne became concerned that the water would ruin part of his crops and so drove a digger onto the victim's property without her permission or consent. He used the digger to dig a trench across her driveway to allow water to flow away from his crops. The victim stood in front of the digger as he drove it towards her and instructed him to stop.

[4] The digging of the trench required urgent repairs the following day to make the victim's driveway operable (resulting in an invoice of $1,127.29).[7] Subsequently, permanent repairs were done to the driveway at a cost of $3,094.08.[8]

[5] Judge B P Callaghan sentenced Mr O'Byrne in the District Court.[9] The victim had attached to her victim impact statement, two invoices as detailed above, totalling $4,221.37 in costs for repair. The Judge sentenced the applicant to pay that sum by way of "actual reparation", as well as the emotional harm repayment of $1,000 and court costs.[10]

[6] Mr O'Byrne appealed his sentence to the High Court. While his notice of appeal addressed both the reparation payment and the emotional harm repayment, his counsel abandoned the appeal in relation to the emotional harm repayment at the

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3 *R v O'Byrne* [2024] NZDC 32326 [sentencing notes].
4 *O'Byrne v R* [2025] NZHC 1471 [HC judgment].
5 Criminal Procedure Act 2011, s 230(1)(b).
6 *O'Byrne v R* CA408/2025, 13 August 2025 (Minute of Courtney J).
7 HC judgment, above n 4, at [5].
8 At [7].
9 Sentencing notes, above n 3.
10 At [5].

hearing.[11] The appeal centred on an argument that the District Court reparation order involved compensation for betterment, as the victim had obtained and installed new pipes during the repairs despite evidence at trial that Mr O'Byrne had left the original pipes untouched. This was relevant because under s 32(3) of the Sentencing Act 2002 the court must take into account any right of the person who suffered the loss or damage to bring proceedings or make "any application in relation to that loss or damage" when assessing the amount of reparation to be ordered.

[7] Osborne J dismissed the appeal. He considered an application by Mr O'Byrne to adduce further evidence on appeal. This was a letter from "Nigel Winter Excavation" containing a quote of $86.25 for pushing two cubic meters of fill back into the trench.[12] The application was withdrawn by Mr O'Byrne's counsel at the appeal hearing.[13] The Judge noted that this was an appropriate concession and commented that he would not have received the letter had it been presented, as it did not meet the threshold of cogency and credibility.[14]

[8] Osborne J was referred to *Chapman v Police*, where Churchman J had allowed evidence of quotations for lesser amounts to be adduced on appeal, ordered a reparation report and remitted the sentence back to the District Court.[15] Osborne J distinguished the case as unlike Mr Chapman, Mr O'Byrne had been legally represented throughout the trial and at sentencing four months later, but had raised no opposition to the use of the invoices produced in the District Court.[16] There was also evidence that a police officer in *Chapman* had expressed "severe reservations" in relation to the victim's quotes.[17]

[9] In any event, Osborne J concluded that there was no admissible evidence that proved that the installation of pipes was not required for purpose of the repair.[18] It did not follow that because culverts were not used in the original design of the driveway,

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11 HC judgment, above n 4, at [11].
12 At [14].
13 At [16].
14 At [16].
15 At [32] citing *Chapman v Police* [2017] NZHC 2307.
16 HC judgment, above n 4, at [34]–[35].
17 At [34].
18 At [37].

that they were not required to repair it when the driveway had been substantially damaged and altered. Mr Byrne had not discharged his onus to prove betterment nor did he provide evidence of its quantum.[19] His failure to seek a reparation report also counted against him.[20]

Application for leave to bring a second appeal

[10] The Court must not give leave for a second appeal unless it is satisfied that the appeal involves a matter of general or public importance, or alternatively that a miscarriage of justice may have occurred or may occur unless the appeal is heard.[21]

Analysis

[11] Mr O'Byrne represents himself. He seeks leave to appeal his sentence relating to the reparation. He makes wide-ranging allegations of fraudulent behaviour by the victim and the Crown counsel who appeared at the hearing in the District Court. He seeks to admit the letter from Nigel Winter Excavation, which is now in the form of an affidavit.[22] Mr O'Byrne also seeks to admit video evidence which apparently shows him making an offer to the police to fill in the trench on the day. Mr O'Byrne says his lawyer failed to produce this evidence at trial. Mr O'Byrne repeats the arguments he made before the High Court, that the repair work undertaken by the victim included the installation of pipes which gave rise to the improvement of the driveway.

[12] Mr O'Byrne's proposed sentence appeal appears to be based on an allegation that the District Court relied on fraudulent invoices and that the repair costs include an element of betterment. There is no evidence to support this allegation. Mr O'Byrne seeks to adduce Mr Winter's letter as an affidavit on appeal, the quote having been criticised because it was not attached to an affidavit, however the evidence does not reach the further evidence requirements of credibility, freshness or cogency.[23]

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19 At [35] and [38], citing Maree Chetwin "Contract" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) at [1.4.6(3)].

20 HC judgment, above n 4, at [39].

21 Criminal Procedure Act, s 253(3).

22 The letter's heading "To whom it may concern" and date have been crossed out and an affirmation recital and jurat have been added in handwriting. The affirmation is dated 14 July 2025.

23 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [119]–[120].

The instructions given to Mr Winter by Mr O'Byrne as to what work was required are not clear and the quote only covers the refilling of the driveway, so excludes the laying of shingle, which was a large component of the claimed costs, or other actions necessary to repair the driveway. The video evidence is also not fresh nor is it cogent. It does not go to proving that betterment has occurred, or that the compensation ordered was for work done over and above what was required to return the driveway to its original state.[24] Mr O'Byrne is also required to provide evidence of quantum, in other words the betterment's "value and extent",[25] but he has provided no admissible evidence to establish that the pipes were not required to restore the driveway to its original standard. His observation that the second stage of repairs took place two years after the original repairs does not establish that the second stage work was not required to fully restore the driveway.

[13] Mr O'Byrne makes allegations of prosecutorial misconduct by Crown counsel in the District Court, including of dishonesty. Mr O'Byrne particularly complains about the first question put to him in cross-examination about an invoice he had sent the victim. The invoice was for the digging up of her driveway which was the matter giving rise to the prosecution. The cross-examination as recorded in the transcript of evidence records a series of questions about the matter which was relevant to the alleged damage to the driveway. While it appears that the cross-examination at times was robust, we can see no basis for the allegation of prosecutorial misconduct. We also note that the transcript does not record that counsel appearing for Mr O'Byrne raised any relevant objections nor was prosecutorial misconduct referred to as an appeal point by Osborne J in the High Court.[26]

[14] Mr O'Byrne focussed on the actual reparation order and not the emotional harm reparation order in his appeal to the High Court.[27] For that reason the Judge did not specifically deal with the emotional harm reparation in dismissing the appeal. Mr O'Byrne refers to it in his application for leave, but he makes no submissions beyond asserting, without evidence, that no emotional harm was suffered by the

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24 *J & B Caldwell Ltd v Logan House Retirement Home Ltd* [1999] 2 NZLR 99 (HC) at 109.
25 At [111].
26 HC judgment, above n 4, at [2].
27 At [2].

victim. As in the High Court the bulk of his submissions are directed toward the actual reparation order.

[15] Mr O'Byrne largely seeks to relitigate findings of fact made in the District Court raising matters which were rejected by the High Court in his unsuccessful first appeal against sentence. He does not identify any errors in the High Court's reasoning. The application for leave does not raise matters of general or public importance, nor is there any risk of a miscarriage of justice if the appeal is not heard.

Result

[16] The application for leave to bring a second appeal against sentence is declined.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent