IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA653/2022
[2023] NZCA 494

BETWEEN	PETER MARTIN COLEMAN Applicant
AND	COMMISSIONER OF INLAND REVENUE Respondent

Court: Brown, Moore and Fitzgerald JJ

Counsel: S M Kilian for Applicant
M R L Davie for Respondent

Judgment: (On the papers) 19 October 2023 at 10.30 am

JUDGMENT OF THE COURT

A The application for an extension of time to file a notice of application for leave to appeal is granted.

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

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

REASONS OF THE COURT

(Given by Moore J)

Introduction

[1] The appellant, Peter Coleman, was found guilty following a Judge-alone trial in the District Court. He was convicted on 42 charges of tax fraud against the Inland Revenue Department (IRD).[1] He was sentenced by Judge N R Dawson to four years and nine months' imprisonment.[2]

[2] Mr Coleman appealed his convictions and sentence to the High Court, although only the former was ultimately pursued. On 8 June 2021, Wylie J allowed the appeal against conviction in respect of charges 2 to 34 (inclusive) on the basis of trial counsel errors and ordered a retrial on those charges.[3]

[3] On 13 December 2021, the District Court granted the IRD leave to withdraw charges 2 to 34.[4] IRD was of the view that a retrial on those charges was not in the public interest given the limited financial loss associated with that offending and the likely costs of a retrial.[5]

[4] Mr Coleman makes three applications:

(a) an application for an extension of time to file a notice of application for leave to appeal;

(b) an application for leave to bring a second appeal against conviction; and

(c) an application for leave to bring a second appeal against sentence.

[5] The Commissioner of Inland Revenue (the Commissioner) opposes leave being granted to bring second appeals but is content for those matters to be determined

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1 *Inland Revenue Department v Coleman* [2019] NZDC 16685 [Conviction decision].
2 *Inland Revenue Department v Coleman* [2019] NZDC 23779 [Sentencing decision].
3 *Coleman v Commissioner of Inland Revenue* [2021] NZHC 1324 [Conviction appeal].
4 Criminal Procedure Act 2011, s 146.
5 Charges 2–34 involved a total tax discrepancy of $242,013.96 and actual loss to the IRD of $202,525.90. These charges therefore formed a relatively small percentage of the overall total tax discrepancy (for charges 1–41) of $1,111,325.55 and actual loss to the IRD of $1,071,837.49.

on the papers. The Commissioner will abide the Court's decision as to an extension of time.

Factual background

[6] Mr Coleman is an accountant. He has extensive experience managing companies.

[7] The charges arise from Mr Coleman's management of various failing businesses in the fishing industry between 2011 and 2016. These were Hagfish NZ Ltd, BJ Fishing Ltd, Kiwi Fishing Ltd, NZ Marine Seafoods Ltd (also known as Southern Hagfish Ltd) and SPH Fishing Ltd.

[8] In addition, Mr Coleman controlled a company named Waka Management Holdings Ltd which he claimed provided management services to the fishing companies in exchange for fees. Mr Coleman also controlled a trust, Hunua Holdings Trust, which owned his home.

[9] Mr Coleman and his associated entities were investigated by the IRD from mid-2014. The investigation unearthed a very significant body of information relating to his tax affairs and those of the various entities he controlled, though not, it appears, through Mr Coleman's cooperation.

[10] In November 2016, the IRD laid the 42 charges against Mr Coleman, alleging conduct that had resulted in unpaid taxes of approximately $1.1 million.

Procedural history

[11] Mr Coleman was tried by Judge Dawson, sitting alone. The four-day trial started on 29 July 2019. The Judge delivered his decision on 6 September 2019.

[12] In summary, the Judge found that Mr Coleman had:[6]

(a) used a forged document (charge 1);

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6 Conviction decision, above n 1.

(b) knowingly provided false information to the IRD with intent to obtain GST refunds for various companies in which he was involved, in circumstances where he knew they were not entitled to them (charges 2 to 34);

(c) evaded the assessment or payment of tax by a trust through which his home was held (charge 35);

(d) failed to provide income tax returns to the IRD, with intent to evade the assessment and payment of income tax (charges 36 to 41); and

(e) dishonestly used a document (charge 42).

[13] Overall, the Judge found Mr Coleman to be a dishonest and unreliable witness.[7]

[14] Mr Coleman was sentenced on 25 November 2019.[8] From a starting point of three years' imprisonment on the lead charge of using a forged document, the Judge applied an uplift of two years for the remaining charges and a discount of three months for Mr Coleman's contribution to the community. This resulted in an end sentence of four years and nine months' imprisonment on each charge, to be served concurrently.

[15] Mr Coleman's appeal against conviction, determined on 8 June 2021, was brought on the basis that trial counsel incompetence had caused justice to miscarry. Wylie J was satisfied this was the case in respect of charges 2 through 34, though not the remaining charges.[9] The position in relation to the appeal against sentence, as the Judge understood it, was that it had been abandoned. He therefore determined that there was no alteration required to the sentence Mr Coleman was at that time serving.[10]

[16] On 31 August 2021, Mr Coleman was released on parole.[11]

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7 At [127].
8 *Inland Revenue Department v Coleman* [2019] NZDC 23779 [Sentencing decision].
9 Conviction appeal, above n 3, at [87].
10 At [6] and [88].
11 His statutory release date and sentence expiry date is 5 June 2024.

[17] On 29 November 2022, some 17 months out of time, Mr Coleman filed the notice of application for leave to bring second appeals against conviction and sentence.

Extension of time to file a notice of application for leave to appeal

Relevant law

[18] The Court has a discretion to extend the time for filing an application for leave to appeal in appropriate cases.[12] As this Court explained in *R v Knight*, the touchstone is the interests of justice in the particular case:[13]

> The applicant must demonstrate some special feature or features particular to the case that lead to the conclusion that in all the circumstances justice requires that leave be given. Amongst the considerations which will also be relevant in that overall assessment are the strength of the proposed appeal and the practical utility of the remedy sought, the length of the delay and the reasons for delay, the extent of the impact on others similarly affected and on the administration of justice, that is floodgates considerations, and the absence of prejudice to the Crown.

Discussion

[19] Mr Coleman has filed an affidavit in support of his application, in which he sets out in some detail the reasons for the delay. Attached to the affidavit are a number of emails he sent to, and received from, his counsel for the High Court appeal (who was not counsel at trial). These illustrate the communication difficulties to which Mr Coleman refers and the lack of progress in regard to the filing of his appeals. There is also an email sent by Mr Coleman to legal aid in which he requests a reassignment of his case.

[20] Having reviewed that evidence, and in the absence of opposition from the Commissioner, we are satisfied that the extension should be granted.

[21] While Mr Coleman's difficulty engaging and retaining counsel may in part reflect personal and professional differences, it is also apparent that there were a number of external factors at play over which he had little or no influence. He also acted on the basis of legal advice.

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12 Criminal Procedure Act, ss 239(3) and 255(3).
13 *R v Knight* [1998] 1 NZLR 583 (CA) at 587 and 589.

[22] For instance, following the determination of Mr Coleman's first conviction appeal on 8 June 2021, his High Court counsel advised him not to pursue the appeal against sentence until after the retrial of charges 2 to 34. She also advised that her legal aid status precluded her from assisting on a further appeal, but that she would try to find a legal aid lawyer suitable to conduct a tax appeal.

[23] By November 2021, the IRD had filed an application to withdraw the charges, but Mr Coleman's High Court counsel advised him to further defer the appeal until the charges had been formally withdrawn. It was her view that the filing of an appeal at that stage might influence the IRD's decision to Mr Coleman's detriment. Charges 2 to 34 were formally withdrawn in December 2021, although it appears that by this stage a replacement legal aid lawyer had not been found.

[24] It was not until February 2022 that legal aid services assigned Mr Coleman's High Court counsel to the appeal on an interim basis together with assistant counsel (who likewise was not counsel at trial), despite Mr Coleman making enquiries the month prior. It appears that the complex nature of the file, complicated by multiple COVID-19 lockdowns in Auckland, contributed to this delay.

[25] Mr Coleman attempted unsuccessfully to arrange an initial call with assistant counsel between 16 February 2022 and 3 March 2022. Thereafter, weekly meetings were set up between him and both counsel to discuss the grounds for further appeal. These continued for a period of seven or so weeks (from 10 March 2022 to 17 May 2022) until his High Court counsel, according to Mr Coleman, abandoned the arrangement due to a disagreement with assistant counsel about the direction of discussions. With the exception of one meeting on 11 August 2022, Mr Coleman says he received no further contact from either counsel.

[26] This ultimately led Mr Coleman on 27 October 2022 to ask legal aid services to reassign his case to another provider. It was reassigned to the Public Defence Service (PDS) on 8 November 2022, who sought two weeks to review the file. They then advised they were unable to act due to a conflict of interest but could start the appeal process. PDS filed the current application for leave before the matter was reassigned to Mr Coleman's current counsel, Mr Kilian.

[27] It is difficult to ascertain what role, if any, Mr Coleman played in the collapse of the arrangement with his High Court counsel and assistant counsel. However, there is no evidence to suggest he is to blame for the subsequent lack of contact between May 2022 and October 2022. He did not sit on his hands. Rather, he followed up on several occasions by various means.

[28] Overall, while significant, the delay is for the most part properly explained. Mr Coleman appears to have acted reasonably in the circumstances, and there is no real prejudice or hardship to the Commissioner if the extension is granted.

[29] The application for an extension of time is accordingly granted. However, for the reasons discussed below, this result is of limited assistance to Mr Coleman on the remaining applications.

Application for leave to bring a second appeal against conviction

Relevant law

[30] Mr Coleman seeks leave to bring a second appeal against conviction under s 237 of the Criminal Procedure Act 2011 (CPA). This Court must not give leave unless satisfied that the appeal involves a matter of general or public importance, or a miscarriage of justice may have occurred, or may occur unless the appeal is heard.[14]

[31] Section 232(4) defines "miscarriage of justice" as any error, irregularity, or occurrence in or in relation to or affecting the trial that:

(a) has created a real risk that the outcome of the trial was affected; or

(b) has resulted in an unfair trial or a trial that was a nullity.

[32] A procedural error such as a failure to cross-examine a witness on key aspects of the case has met the threshold of a risk of a miscarriage of justice previously.[15] In general, however, this Court will be slow to grant leave where success for the

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14 Criminal Procedure Act, s 237(2).
15 *Cummings v Police* [2018] NZCA 340.

appellant would require it to reverse concurrent findings of fact below.[16] That is especially the case where the trial was judge-alone, as was the case here. Mr Coleman enjoys the benefit of two judgments giving reasons for the factual findings made.[17]

Discussion

[33] Plainly, there is no question of general or public importance arising from the proposed appeal. The issue is whether trial counsel's conduct gave rise to a risk of miscarriage of justice.

[34] In essence, Mr Kilian submits that in preparing for trial, trial counsel failed to properly consult with Mr Coleman, take him through the IRD's evidence and disclosure, or obtain instructions on any aspect of the matter. This had flow-on effects for the trial itself, particularly the adequacy of Mr Coleman's evidence and the cross-examination of the IRD witnesses. Mr Kilian says that trial counsel's incompetence caused justice to miscarry.

[35] The leading decision in this area is *R v Sungsuwan*.[18] There the Supreme Court framed the applicable test in the following terms:

> [70] In summary, while the ultimate question is whether justice has miscarried, consideration of whether there was in fact an error or irregularity on the part of counsel, and whether there is a real risk it affected the outcome, generally will be an appropriate approach. If the matter could not have affected the outcome any further scrutiny of counsel's conduct will be unnecessary. But whatever approach is taken, it must remain open for an appellate Court to ensure justice where there is real concern for the safety of a verdict as a result of the conduct of counsel even though, in the circumstances at the time, that conduct may have met the objectively reasonable standard of competence.

[36] While consideration of the substantive appeal is not appropriate on an application for leave,[19] we see no option but to briefly assess the respective merits of each proposed ground of appeal in order to determine whether leave should be granted.

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16 *R (CA176/2016) v Police* [2016] NZCA 403 at [26], citing *Butler v Police* [2016] NZCA 27 at [3].
17 At [26], citing *Warren v R* [2016] NZCA 108 at [30].
18 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730.
19 *Practice Note – R v Leonard* [2007] NZCA 452, [2008] 2 NZLR 218 at [47].

[37] In our view, the issue is best approached by considering each of the convictions upheld by the High Court Judge against the following questions:

(a) Was the Judge correct that trial counsel's conduct did not affect the safety of the conviction which he upheld?

(b) Relatedly, does the evidence support the essential elements of each charge?

[38] If in relation to each charge or group of charges, both of those questions are answered in the affirmative, no risk of miscarriage of justice arises. It is to that enquiry we now turn.

(a) Charge 1: Using a forged document

[39] The Judge explained the factual background of this charge as follows:[20]

> [12] The charge of using a forged document (charge 1) arose out of a request that the IRD made to Mr Coleman for information to support a GST return filed by Hagfish NZ Ltd on 14 February 2014. The return showed nil sales but recorded expenses of $189,926.82. Hagfish NZ Ltd sought a GST refund of $24,773.06. Mr Coleman provided a tax invoice from Nelson Slipway for repairs to a fishing vessel. During the search of Mr Coleman's home, the IRD found various reprinted versions of the invoice. The principal investigator for the IRD, Angela Curtis, gave evidence that the reprinted versions of the invoice showed that multiple attempts had been made to match, line up, copy and paste into the invoice a higher GST inclusive figure than was actually charged. The principal issue at trial was whether the invoice said to support the GST refund claim was false, or as Mr Coleman put it, whether there was "a claim of right".

[40] We are satisfied that trial counsel's conduct did not affect the safety of this conviction. While Ms Curtis was not cross-examined on the IRD's allegations, Mr Rowling, the managing director of Nelson Slipway, was. Trial counsel put Mr Coleman's version of events to him. Mr Coleman also gave evidence on the point and advanced his defence.

[41] The crux of Mr Kilian's submissions on this charge appears to be that Mr Coleman was entitled to rely on an earlier (27 September 2013) invoice which he

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[20] Conviction appeal, above n 3.

had been given by Nelson Slipway, for a higher price than was actually charged, and that if a credit or discount was later issued it would have been reflected in later returns.

[42] Mr Davie, for the Commissioner, argues that this submission lacks merit because a taxpayer is not entitled to claim a GST refund on expenses which they know they have not incurred and will not incur. Mr Coleman applied for the GST refund on 14 February 2014, and submitted the forged invoice on 18 March 2014, whereas payment of the (actual) invoice was made on 21 November 2013. Moreover, Mr Coleman admitted to creating the false invoice which had the appearance of one issued by Nelson Slipway.

[43] We accept Mr Davie's submissions. It is not a defence to the charge that the information in the forged invoice was correct as at 27 September 2013, because the offence of forgery is concerned with "falsity of authorship, not falsity of content".[21] The evidence supports the essential elements of the charge.

(b) Charge 35: Evading the assessment or payment of tax by a trust through which Mr Coleman's home was held

[44] The Judge explained this charge in the following terms:[22]

> [14] The charge (charge 35) of evading the assessment and payment of tax by a trust related to Mr Coleman's home. The Hunua Holdings Trust owned the property. When it purchased the property in 2001, it sought and obtained a GST refund. Mr Coleman, when requested, provided a copy of the agreement for sale and purchase and a deed of lease recording that the property had been leased to another company controlled by Mr Coleman for use as a farm stay. However, the farm stay company did not trade; rather it was used to fund Mr Coleman's personal expenses. Ultimately, it was struck off the Companies Register. The IRD determined there had been a change of use – ie that Mr Coleman was using the property as his personal residence – and that this had not been declared. This triggered a liability to return the GST refund to the IRD. It was not paid back. Ultimately, the property was sold by the mortgagee and it did not account for the GST refund either because it held a declaration from Mr Coleman asserting that the property was not used for a taxable activity. Mr Coleman had also written to the mortgagee's solicitors asserting that the Trust had not claimed a GST refund. At trial, Mr Coleman denied that a GST input claim had ever been filed. It was his argument that he did not intend to evade the payment of the GST.

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21 *R v Walsh* [2006] NZSC 111, [2007] 2 NZLR 109 at [9].

22 Conviction appeal, above n 3.

[45] Mr Kilian's core submission on this charge is that trial counsel's failure to cross-examine IRD witnesses resulted in the application of the GST legislation not properly being put into evidence, particularly that the responsibility is on the mortgagee (ASB Bank Ltd) to return GST.

[46] The Commissioner's position is that this is wrong. While ASB as the mortgagee was responsible for paying GST from the proceeds of sale, Mr Coleman and any other trustees of the Hunua Trust between 2011 (when the Hunua Road property was used for purely residential purposes) and 2015 (when ASB sold the property) were solely responsible for paying GST.

[47] In any event, as Mr Davie points out, it was Mr Coleman's letter of 18 May 2015, in which he falsely told ASB that the Hunua Trust had never claimed a GST input, that caused ASB not to pay GST. It is therefore irrelevant that ASB may have been able to uncover the true position by making independent inquiries.

[48] We struggle to see how cross-examination of the IRD witnesses on this point would affect the deception practised by Mr Coleman or absolve him of guilt. The evidence supports the essential elements of the charge:

(a) Mr Coleman evaded, or attempted to evade, the assessment or payment of GST for himself or for ASB; and

(b) he had knowledge of the obligation to be assessed for or to pay GST under a tax law; and

(c) he intended to evade the assessment or payment of GST for himself or ASB.

(c) Charges 36 to 41: Failing to provide income tax returns to the IRD with intent to evade the assessment and payment of income tax

[49] The Judge summarised these charges as follows:[23]

> [15] The six charges (charges 36–41) of failing to provide information to the Commissioner related to Mr Coleman's personal tax returns. It was the IRD's case that Mr Coleman had failed to file tax returns for the tax years 2011 to 2016 (inclusive), that Mr Coleman was receiving significant self-employed income over those years and that he had failed to account for the same or to pay tax on that income. Mr Coleman challenged the assessments and denied that he intended to evade his tax obligations.

[50] Mr Kilian submits that the case was not put to Ms Curtis about the manner in which shareholders of a company can address funds taken for personal use, meaning that the Court determined that all funds taken for personal use were automatically income not returned.

[51] Mr Davie says this goes only to quantum — it is not a defence to charges of failing to file returns to evade the assessment or payment of income tax. Moreover, Mr Coleman's evidence at trial was that he did not have time to file returns because he was waylaid by other matters, not that he believed his income was not really income.

[52] In our view, even if this argument had been raised at trial, we do not consider it would have affected Mr Coleman's liability for the reasons advanced by the Commissioner. Mr Coleman accepted that he was required to file returns and did not do so. The fact that he disagrees with the IRD's assessment of his tax liability is not a defence. As Wylie J observed, such charges do not require proof of the amount of tax evaded.[24] The evidence supports the essential elements of the charge and the conviction is unaffected by trial counsel's conduct.

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23 Conviction appeal, above n 3.

24 At [81], citing *Smith v R* [2008] NZSC 110, (2009) 24 NZTC 23,176 at [2].

(d) Charge 42: Dishonestly using a document

[53] In respect of charge 42, the Judge stated:[25]

> [16] The charge of falsely using a document (charge 42) related to a document known as an AR590. An AR590 is a formal financial declaration. Mr Coleman completed the form seeking relief from his tax obligations. The issue at trial was whether Mr Coleman dishonestly represented his financial position when he applied for financial relief.

[54] Mr Kilian argues that the IRD officer who dealt with the application ought to have been called as a witness and examined on discussions they had with Mr Coleman. We agree with the Commissioner that this submission invites speculation in the absence of an affidavit setting out what the officer's evidence would have been.

[55] Mr Kilian advances a similar argument to that in respect of charges 36 to 41; that trial counsel failed to put to Ms Curtis that some of the income was not actually income, but loans from companies Mr Coleman controlled. Again, this is unsupported by any documentation and inconsistent with Mr Coleman's evidence at trial, which was that he did his best to correctly state his income and if he omitted anything, it was because he did not think the payments had sufficient regularity to qualify as income. Mr Coleman was cross-examined extensively in relation to these explanations.

[56] It follows that we do not consider that trial counsel's conduct affects the safety of this conviction. The evidence supports the essential elements of the charge, namely that Mr Coleman dishonestly used a document with intent to obtain a pecuniary advantage (here tax relief).

Conclusion on leave to bring a second conviction appeal

[57] While trial counsel's conduct plainly fell below the standard expected of a trial lawyer,[26] we are not satisfied that a miscarriage of justice may have occurred, or may occur unless the appeal is heard, insofar as charges 1, 35, 36–41 and 42 are concerned. Leave to appeal is accordingly declined.

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25 Conviction appeal, above n 3.
26 At [55].

Application for leave to bring a second appeal against sentence

[58] Section 253(1) of the CPA confers on a convicted person a right, with leave, to appeal against the determination of a first appeal against sentence. The Court must not grant leave unless satisfied that the appeal involves a matter of general or public importance, or a miscarriage of justice may have occurred, or may occur unless the appeal is heard.[27] However, as we explain, the determination of this application turns predominantly on jurisdiction rather than any question of general or public importance, or risk of miscarriage of justice.

[59] Mr Kilian submits that the position in relation to the first sentence appeal is as follows. Mr Coleman filed an appeal against sentence at the same time as he filed the first appeal against conviction. However, the sentence appeal was not listed on the "Memorandum Advising Grounds of Appeal" filed by PDS, nor pursued at the hearing before Wylie J. Mr Kilian was advised that the PDS had limited time to review the filed grounds of appeal or consider those outside the memorandum. Mr Kilian acknowledges that the sentence appeal was not progressed, but submits that neither was it formally abandoned.

[60] Mr Kilian submits that the High Court Judge erred in failing to review the effect of his decision (overturning convictions on 33 charges) on the sentence imposed in the District Court. He further argues that the first appeal court has an inherent jurisdiction to review a sentence upon allowing a conviction appeal, even if the sentence itself has not been appealed, although he accepts that there is no such guideline or authority to assist in these circumstances.

[61] The Commissioner's position is that there is simply no jurisdiction for a second appeal because there has been no determination of a first appeal. If Mr Coleman takes the position that he did not intend to abandon his sentence appeal, abandoned it by mistake or never abandoned it at all, the Commissioner says that the correct pathway is to persuade the High Court to hear a first appeal.

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[27] Criminal Procedure Act, s 253(3).

[62] We consider that the Commissioner's position must be correct. The submission that the High Court has the inherent jurisdiction to review a sentence on a conviction appeal is novel, unsupported by authority and, we think, conceptually wrong. The usual course in these circumstances would be to remit the matter back for re-sentencing in the first instance court. In remitting charges 2 to 34 back to the District Court for retrial, Wylie J could not have determined the appropriate sentence even if he had been asked to. Sentencing could only take place after the determination of the charges in the lower Court when the extent of the proved offending could be properly assessed.

[63] We acknowledge the complexities introduced when the IRD withdrew the charges and the fact that the High Court sealed the notice of result recording the abandonment of the sentence appeal, despite Mr Coleman never filing a formal notice of abandonment. However, it is not for this Court to determine the correct factual and legal position. That is a matter for the High Court to determine.

[64] As we see it, there are likely to be two options available to Mr Coleman. First, the High Court could determine that the appeal against sentence was never abandoned and is thus, technically, still on foot. In those circumstances, it may be that the Court would exercise its remedial powers to correct the certified record or set aside the sealed notice of result under the High Court Rules 2016, Criminal Procedure Rules 2012, or its inherent jurisdiction. Alternatively, if the High Court considers that the appeal was abandoned or was treated as abandoned, it may review the circumstances and, if considered necessary in the interests of justice, reinstate the appeal.[28]

[65] Finally we observe that the appeal against sentence is somewhat moot, given that Mr Coleman has served his sentence and been released on parole, but we recognise that such appeals have nonetheless been pursued in the past.[29]

[66] Leave to bring a second appeal against sentence is accordingly declined. Any remedy properly lies in the High Court.

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[28] *R v Cramp* [2009] NZCA 90 at [26].

[29] *Haereroa v R* [2020] NZCA 169; *Box v Police* [2018] NZHC 286; and *Vae v Police* [2013] NZHC 2664.

Result

[67] The application for an extension of time to file a notice of application for leave to appeal is granted.

[68] The application for leave to bring a second appeal against conviction is declined.

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

Solicitors:
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