HIGH COURT OF AUSTRALIA

NETTLE J

IN THE MATTER OF AN APPLICATION BY SIMON GOLDING FOR LEAVE TO ISSUE OR FILE

Re Golding
[2020] HCA 38
Date of Judgment: 21 October 2020
B35/2020

ORDER

Application dismissed.

CATCHWORDS

Re Golding

High Court – Appellate jurisdiction – Application for special leave to appeal – Abuse of process – Where applicant applied for special leave to appeal – Where applicant previously made application for special leave to appeal – Where previous application for special leave refused – Where substance of subsequent application for special leave substantially identical to substance of previous application for special leave – Where no exceptional circumstances identified in subsequent application explaining failure to raise novel issues in previous application – Whether subsequent application for special leave an abuse of process.

Words and phrases – "abuse of process", "application for special leave to appeal", "compelling explanation or circumstance", "exceptional circumstance", "interlocutory application", "res judicata", "same subject matter", "special leave".

Federal Court of Australia Act 1976 (Cth), ss 24(1A), 25(2).
Judiciary Act 1903 (Cth), ss 21(1), 34(2), 35(2).
High Court Rules 2004 (Cth), rr 6.07, 13.03.

1 NETTLE J. The applicant requires an extension of time in which to seek leave to issue or file a second application for special leave to appeal against orders of the Court of Appeal of the Supreme Court of Queensland (Gotterson, Morrison and McMurdo JJA), dismissing the applicant's appeal against conviction of an offence of the importation into Australia of a commercial quantity of a border controlled substance, namely, cocaine, contrary to s 11.2A(1) and (2) and s 307.1(1) of the *Criminal Code* (Cth).

2 On 4 September 2019, the applicant applied for an extension of time in which to seek special leave to appeal on grounds that the Court of Appeal had erred in failing to hold that the Australian Crime Commission's examination of the applicant, after he had been charged with the subject offence, was an abuse of process that so undermined his common law right to silence and so violated the statutory responsibilities of the Australian Crime Commission and the Australian Federal Police as to bring the administration of justice into disrepute.

3 On 12 February 2020, Bell J and I dismissed the application on the basis that the applicant had not identified prejudice arising from his compulsory examination by the Australian Crime Commission sufficient to engage the principles in *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)*[1], and, thus, that any appeal to this Court would not enjoy a sufficient prospect of success to warrant a grant of special leave to appeal[2].

4 The applicant filed this second application for extension of time and special leave to appeal on 14 April 2020 and, on 7 May 2020, Gageler J directed, pursuant to r 6.07 of the *High Court Rules 2004* (Cth), that the Registrar refuse to issue or file the document without the leave of a Justice first had and obtained.

5 The applicant contends that he is entitled to make this second application for extension of time and special leave to appeal, despite the dismissal of his first application, because, he submits, an application for extension of time and an application for special leave to appeal are interlocutory applications and, therefore, it is open to him as a disappointed applicant to apply again for the same relief.

6 I accept that an application for an extension of time and an application for special leave to appeal are interlocutory applications, and, therefore, that, other

---

1 (2018) 266 CLR 325.

2 *Golding v The Queen* [2020] HCASL 28.

things being equal, it might be open to a disappointed applicant to try again[3]. But it is to be observed that the Full Court of the Federal Court of Australia has held that, because the determination of an application for leave to appeal to the Full Court of that Court is determined in the exercise of the Federal Court's appellate jurisdiction (whether by a single judge or the Full Court), it is not open to an applicant to make a second application for leave to appeal. In *Thomas Borthwick & Sons (Pacific Holdings) Ltd v Trade Practices Commission*[4], the Full Court concluded that to hold otherwise would set at nought the provisions of ss 24(1A) and 25(2) of the *Federal Court of Australia Act 1976* (Cth)[5]. And since the form of those provisions closely follows the form of ss 21(1), 34(2) and 35(2) of the *Judiciary Act 1903* (Cth)[6], it is arguable that the same is true of applications for special leave to appeal to the High Court.

7 It is unnecessary, however, for the purposes of this application finally to determine that question, because, assuming for the sake of argument it is open to an applicant to make a second application for special leave to appeal, I consider that an appeal to this Court would be bound to fail.

8 The proposed grounds of appeal preferred in the applicant's first application for special leave to appeal, filed on 4 September 2019, were as follows:

> "**PART I: Proposed grounds of appeal**
>
> **I.I** The Queensland Court of Appeal erred in law by holding that there had not been occasioned to the Applicant a miscarriage of justice by reason of an abuse of process arising from the fact of the Applicant's unlawful examination by the Australian Crime Commission ('ACC') on

---

3 See and compare *Hall v Nominal Defendant* (1966) 117 CLR 423 at 439-440 per Taylor J; *Licul v Corney* (1976) 180 CLR 213 at 225 per Gibbs J; *Carr v Finance Corporation of Australia Ltd [No 1]* (1981) 147 CLR 246 at 248 per Gibbs CJ.

4 (1988) 18 FCR 424 at 433 per Bowen CJ, Lockhart and Sheppard JJ; see and compare *Hamod v New South Wales* (2002) 188 ALR 659 at 663 [15] per Gray J.

5 See *Federal Court of Australia Act 1976* (Cth), ss 20(3), 24(1AA). See also *Eastman v The Queen* (2000) 203 CLR 1 at 11 [11]-[13] per Gleeson CJ, citing *Davies and Cody v The King* (1937) 57 CLR 170 at 172 per Latham CJ.

6 Which provide, in substance, that applications for special leave to appeal to the High Court from a judgment of another court, and applications for leave to appeal from an interlocutory judgment of a Justice or Justices of the High Court exercising the Court's original jurisdiction, may be heard by a single Justice or by a Full Court of the High Court, and that appeals shall not be brought from such judgments unless the High Court grants special leave to appeal, or leave to appeal, respectively.

22 October 2010 and consequent deprivation of forensic advantage in that the Applicant could not have exercised his right to give or not give evidence without risk of further prosecution if his evidence was in contradistinction to the evidence he was compelled to give before the ACC

I.II The Queensland Court of Appeal erred in law by failing to recognise the Executive examination of the Applicant by the ACC on the subject charge did not violate or undermine the '*trust reposed constitutionally*' per French CJ, Gummow, Hayne, Crennan, Kiefel (as her Honour was) and Bell JJ; **Moti v R (2011) 245 CLR 456 at 478 at para 57** in the CH III courts to protect the integrity and fairness of their processes.

I.III The Queensland Court of Appeal erred in law by holding that the Applicant's trial was not a miscarriage of justice nor an abuse of process justifying a permanent stay of criminal proceedings in circumstances where there had been Executive examination on charge of the Applicant on 28 October 2010 by the ACC thereby constituting a contempt of court and an impermissible interference with the administration of criminal justice by compromising the Applicant's right of election pursuant to s618 of the Criminal Code (Qld) and Rule 50 of the Criminal Practise Rules 1999(Qld), as picked up and applied by s68 of the Judiciary Act 1903(Cth).

I.VI The Queensland Court of Appeal erred in law by holding that a permanent stay of criminal proceedings is only available where a person is able to demonstrate actual practical prejudice caused by Executive examination on charge." (emphasis and errors in original)

9 The proposed grounds of appeal preferred in the applicant's proposed second application for special leave, filed on 14 April 2020, are:

"**I.I:** The Court of Appeal erred in law by holding that there had not been occasioned to the Applicant a miscarriage of justice by reason of the prosecution failing to disclose the identity of potential witnesses and statements thereof lawfully sought and *ordered by the Court*. Similar failures to disclose the identity of potential witnesses were regarded in ***Alister v The Queen [1984] 154 CLR 404 (Alister)*** (per Brennan J at **[*451*]**) as rendering the trial one that was not 'a trial according to law' as the right of the accused to procure witnesses should not have been denied to a defendant.

I.II: The Court of Appeal erred in law by holding that there had not been occasioned to the Applicant a miscarriage of justice, as it was known to the Court the prosecution were in attendance at the Applicant's unlawful coercive examination (see ***X7 v Australian Crime Commission (2013) 248 CLR (X7)***), were armed with, in possession of and, as presented within the record book, there was an element of uncontrolled dissemination

of the coercive examination product to and within the AFP, ACBPS and the office of the CDPP, all in disregard of key safeguards within the *ACC Act*. Such issues were deemed to have resulted in a substantial miscarriage of justice in ***Lee v The Queen (2014) HCA 20 (Lee No 2)*** see also ***Strickland (a pseudonym) and others v DPP (Cth) [2018] HCA 53 (Strickland)***.

I.III: The Court of Appeal failed to recognise that the Executive examination held by the Australian Crimes Commission (ACC) upon the Applicant (being an unlawful post-charge examination on the subject matter of the charge, see: *X7*) was not a 'special investigation / operation in fact'. As a result, that Court failed to recognise that the ACC, AFP and ACBPS had violated and/or undermined their 'statutory responsibilities' as recognized per Kiefel CJ, Bell and Nettle JJ in ***Strickland*** at ***[101]***, within *Division 2 of Pt II* of the *ACC Act*. Such actions infringed upon the Applicant's *common law right* to silence, which has arguably brought the administration of justice into disrepute.

I.IV: New Ground: The Court of Appeal failed to recognise the Supreme Court's effective finding of the Applicant's, within a restricted hearing and the consequent published ruling – *without pseudonym names* – inferring the Applicant's guilt, prior to jury trial held, therefore resulting in a violation of the Applicant's mandatory common law right of a trial by jury within provisions of the *Jury Act (Qld)* and the irredeemable prejudice that arose, as the trial Judge Atkinson J and Court staff were privy to a published ruling and embargoed coercive examination product held within the Court's files." (emphasis and errors in original)

10 In his affidavit in support of the application, the applicant in effect contends that this second application for special leave to appeal should not be regarded as an abuse of process because Grounds II and III as preferred in the proposed second application are in substance the same as draft grounds of appeal that were presented to senior counsel in advance of the first application for special leave, but which counsel advised should not be included for fear they would detract from the prospects of success of the grounds that were advanced. The applicant says nothing as to why Grounds I and IV preferred in the proposed second application were not advanced in support of the first application.

11 The fact that the applicant may have wished to advance grounds in support of an interlocutory application that counsel advised, and the applicant accepted, were unmeritorious or unhelpful to the application is not a basis to apply again on those grounds. Nor is it a basis to apply again that, either before or after the first application, further grounds might have occurred to an applicant on which the applicant now seeks to rely. Generally speaking, an applicant for interlocutory relief is required to advance all of the grounds on which he or she relies in support of the relief sought; and, in the absence of exceptional circumstances, such as, for example, the discovery of facts of which the applicant was not aware and which

the applicant could not have ascertained with reasonable diligence at the time of the first application, it will ordinarily be regarded as an abuse of process to make a second application for interlocutory relief on the same or other grounds[7]. Furthermore, in the case of an application for special leave to appeal, it is also to be borne in mind that, although refusal of an earlier application for special leave is not *res judicata* between the parties, the order refusing the first application has long been conceived of as "the final curial act which brings the litigation between the parties to an end"[8]. Thus, in the absence of a compelling explanation or circumstance, the practice of this Court is to regard a subsequent application for special leave traversing substantially the same subject matter as an earlier application as an abuse of process[9].

---

7 See *Mullins v Howell* (1879) 11 Ch D 763 at 766 per Jessel MR; *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257 per Somervell LJ (Evershed LJ agreeing); *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602-603 per Gibbs CJ, Mason and Aickin JJ; *Arnold v National Westminster Bank Plc* [1991] 2 AC 93 at 108-109 per Lord Keith of Kinkel; *Bradford & Bingley Building Society v Seddon* [1999] 1 WLR 1482 at 1490-1493 per Auld LJ (Ward and Nourse LJJ agreeing); [1999] 4 All ER 217 at 225-228; *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 30-31 per Lord Bingham of Cornhill (Lord Goff of Chieveley, Lord Cooke of Thorndon and Lord Hutton agreeing); *UBS AG v Tyne* (2018) 265 CLR 77 at 94-96 [38]-[45] per Kiefel CJ, Bell and Keane JJ, 122-123 [119]-[121] per Nettle and Edelman JJ. cf *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 at 590 per Lord Kilbrandon. See and compare *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 684 per Mason A-CJ, Wilson and Brennan JJ; *Autodesk Inc v Dyason [No 2]* (1993) 176 CLR 300 at 302 per Mason CJ; *De L v Director-General, NSW Department of Community Services [No 2]* (1997) 190 CLR 207 at 215, 223 per Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

8 *Smith Kline & French Laboratories (Australia) Ltd v The Commonwealth* (1991) 173 CLR 194 at 218 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, see also at 217. See also *Coulter v The Queen* (1988) 164 CLR 350 at 356-357 per Mason CJ, Wilson and Brennan JJ, 359-360 per Deane and Gaudron JJ.

9 See *Applicant S116/2003 v Minister for Immigration and Citizenship* [2008] HCASL 20; *SZAKL v Minister for Immigration and Citizenship* [2008] HCASL 25; *SZFIO v Minister for Immigration and Citizenship* [2008] HCASL 27; *SZAPF v Minister for Immigration and Citizenship* [2008] HCASL 33; *SZAUV v Minister for Immigration and Citizenship* [2008] HCASL 36; *MZXOW v Minister for Immigration and Citizenship* [2008] HCASL 73; *SZCNP v Minister for Immigration and Citizenship* [2008] HCASL 216; *Plaintiffs A17 of 2006 v Minister for*

12 Lest it be thought, however, that so to conclude may be to deprive the applicant of a chance of acquittal otherwise fairly open to him, it is also to be observed that proposed Grounds II and III add nothing in substance to what was advanced in support of the first application, and, on the material advanced in support of this application, there is no reason to doubt the correctness of the holdings the subject of those grounds.

Conclusion

13 For these reasons, I direct, pursuant to r 13.03.1 of the *High Court Rules*, that the application be determined without listing it for hearing. It is ordered that the application be dismissed.

Immigration and Multicultural and Indigenous Affairs [2008] HCASL 281; *VOAQ v Minister for Immigration and Multicultural Affairs* [2008] HCASL 442; *Kowalski v Mitsubishi Motors Australia Ltd* [2009] HCASL 45; *Singh v Secretary, Department of Education, Employment and Workplace Relations* [2011] HCASL 170; *Hettiarachchi v The Queen* [2013] HCASL 5; *Santos v Western Australia* [2014] HCASL 226; *Lei v Lei* [2017] HCASL 65.