

5 R v Kaitamaki

10 Court of Appeal Wellington
23 October 1981
Richardson, McMullin and Barker JJ

15 *Criminal law — Appeal to Privy Council — Application to Court of Appeal for legal aid — Whether Court of Appeal has jurisdiction to grant legal aid to an applicant who is petitioning the Privy Council for leave to appeal — Offenders Legal Aid Act 1954, s 2.*

20 The Court of Appeal has no jurisdiction under the Offenders Legal Aid Act 1954 to grant legal aid in a criminal case for an appeal to the Judicial Committee of the Privy Council (see p 528 line 17).

Fryer v Superintendent of Her Majesty's Prison at Paparua [1979] 1 NZLR 693 and *R v Nakhla (No 2)* [1974] 1 NZLR 453 referred to.

25 **Other case mentioned in judgment**
Roulston v The Queen [1977] 1 NZLR 365 (Note).

Note
Refer 4 Abridgement 312.

30 **Motion**
This was an application to the Court of Appeal under s 2 of the Offenders Legal Aid Act 1954 for legal aid for an appeal to the Privy Council from a judgment of the Court of Appeal [1980] 1 NZLR 59.

35 *B V MacLean* for the applicant.
J H C Larsen for the Crown.

40 The judgment of the Court was delivered by
RICHARDSON J. Tamaitirua Kaitamaki was found guilty by a jury in the High Court at Auckland on one count of rape and one count of burglary. His appeal against conviction was dismissed on 19 March 1980, the judgments in this Court being reported at [1980] 1 NZLR 59. He is petitioning the Judicial Committee of the Privy Council for leave to appeal against that decision and, in order to facilitate the prosecution of that petition, he has applied to this Court for a grant of legal aid.

45 The jurisdiction relied on by the applicant is that conferred under s 2 of the Offenders Legal Aid Act 1954. Subsection (1) provides as follows:

50 "Any Court having jurisdiction in criminal proceedings may, in respect of any stage of any criminal proceedings and in accordance with this Act, direct that legal aid be granted to any person charged with or convicted of any offence, if in its opinion it is desirable in the interests of justice to do so."

Subsection (5) goes on to provide that the power conferred on the Court by the section may be exercised in accordance with any regulations made under the Act by any Judge, District Court Judge or Justice of the Peace. And s 3(1) authorises the

Governor-General to make such regulations as may in his opinion be necessary or expedient for giving full effect to the provisions of the Act. The Offenders Legal Aid Regulations 1972 deal with the grant of legal aid by the District Court, the High Court and this Court in respect of proceedings in those Courts (see particularly regs 5 and 6). They make no reference to criminal proceedings before the Judicial Committee; and the scale of fees and expenses payable to assigned practitioners set out in the second schedule is both directed and confined to proceedings in the District Court and the High Court under the Summary Proceedings Act 1957, to proceedings in the High Court under the Crimes Act 1961, and to appeal or review proceedings before this Court.

In support of the present application Mr MacLean relied on the wide language of s 2(1). He submitted that a criminal Court has jurisdiction to grant legal aid in any criminal proceedings whether or not the particular matter is currently before that Court or has ever been before that Court or is to come before that Court. So, it was contended, any criminal Court, including this Court, has jurisdiction to grant legal aid in respect of the applicant's petition for leave to appeal to the Judicial Committee.

Subsection (1) is not felicitously drafted but we are satisfied that it does not empower this Court to grant legal aid in respect of proceedings before the Judicial Committee. The subsection does not simply empower a Court of criminal jurisdiction to grant legal aid to any person charged with or convicted of an offence. It must be a Court "having jurisdiction" in criminal proceedings; not one which has had jurisdiction or may in the future have that jurisdiction. The subsection goes on to provide that the power is exercisable in respect of any stage of any criminal proceedings and in accordance with the Act. Those earlier words must be intended to refer to the criminal proceedings in respect of which legal aid is sought. Reading the subsection as a whole the power to grant legal aid is sensibly vested in and limited to the Court which is at that time seized of the proceedings.

This Court has no jurisdiction to give leave to appeal to Her Majesty in Council in a criminal matter, either by statute or under the New Zealand (Appeals to the Privy Council) Order 1910 (*Fryer v Superintendent of Her Majesty's Prison at Paparua* [1979] 1 NZLR 693). Where, as here, an appeal from the High Court has been finally determined this Court is functus officio (*R v Nakhla (No 2)* [1974] 1 NZLR 453) and has no jurisdiction in relation to a petition to Her Majesty in Council.

That is sufficient to dispose of the present application, but there is a further fatal objection to it. In terms of subs (1) a grant of legal aid may only be made "in accordance with this Act". Subsection (5) provides for that power to be exercised, *in accordance with regulations made under the Act*, by a Judge, District Court Judge or Justice; and the regulations do not in their terms extend to criminal matters before the Judicial Committee.

We express no view as to the jurisdiction of the Judicial Committee to grant legal aid in criminal cases. That is a matter for their Lordships; and we note that in *Roulston v The Queen* [1977] 1 NZLR 365 the Judicial Committee doubted whether it had power under the Offenders Legal Aid Act to grant legal aid in respect of a petition for special leave.

For the reasons we have given the application is dismissed.

Application dismissed.

Solicitors for the applicant: *Davenports* (Auckland).
Solicitor for the Crown: *Crown Solicitor* (Auckland).