IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CRI 2009-488-09
CRI 2009-488-15
CRI 2009-488-25

JOHN COLMAN
Appellant

v

THE POLICE
Respondent

CRI 2009-488-18

JOHN COLMAN
Appellant

v

THE POLICE AND JGA CALVERT
Respondent

CRI 2009-488-19

JOHN COLMAN
Appellant

v

NEW ZEALAND MINISTERS OF THE CROWN
Respondent

Hearing: 15 and 21 July 2009

Appearances: Appellant in person
M B Smith and D A Coleman for respondents (except Mr Calvert)
J Collins for Mr Calvert

Judgment: 22 December 2009

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 10.30 am on Tuesday 22 December 2009

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Introduction

[1] On the afternoon of 17 December 2007, the appellant, Mr Colman, was working in the grounds of his residence in Whangarei. An incident then occurred. (I use a deliberately neutral term because Mr Colman is highly critical of the finding of the District Court Judge that a dispute had arisen between Mr Colman and others.)

[2] During the course of the incident Mr Colman used some extremely strong language. The police were called. Mr Colman was arrested, taken to the Whangarei police station and charged.

[3] Unfortunately, a simple case which ought to have been resolved relatively promptly was drawn out over a period of about 18 months. There are one or two remarkable features of the convoluted procedural history. Eventually Mr Colman was acquitted on a charge of disorderly conduct, but convicted on a charge of using insulting words within hearing of a public place, being reckless as to whether any person was insulted by those words.

[4] Mr Colman filed three separate appeals against his conviction. Two of them relate to matters arising during the interlocutory stages of the case against him, while the third is concerned with the trial itself.

[5] During the prolonged course of the criminal proceedings, Mr Colman formed the view that the actions of certain police officers associated with his case were such as to amount to a perversion of the course of justice. Constable Calvert was a primary target.

[6] In November 2008, Mr Colman swore and filed two informations against Constable Calvert alleging that he "wilfully attempted to obstruct, prevent, pervert or defeat the course of justice in New Zealand".

[7] Three additional informations were sworn and filed against the Whangarei police, alleging that they had "wilfully attempted to obstruct, prevent, pervert or defeat the course of justice".

[8] On 5 January 2009 Mr Colman swore and filed five replacement informations against each of Mr Calvert and the Whangarei police. In a decision given on 25 March 2009, Judge McDonald declined to authorise the issue of summonses in respect of the 10 informations.

[9] Mr Colman appeals against that decision.

[10] Mr Colman also swore and filed separate informations against the Minister of Police, the Minister of Justice, the Attorney-General, the Minister for Courts and the Minister of Health. Each was named by virtue of his or her office and not by name. In each case Mr Colman alleged that the defendant had committed the offence of perverting the course of justice pursuant to s 117(e) of the Crimes Act 1961, in that the defendant "contravened the informant's rights not to be subjected to disproportionately severe treatment, and contravened the informant's right to a fair hearing by an impartial Court".

[11] In a second judgment also given on 25 March 2009, Judge McDonald likewise refused to authorise the issue of summonses against these proposed defendants. Mr Colman has filed a fifth appeal against that decision.

[12] I turn to the history of the case, which it is necessary to canvass in a little detail.

Background

[13] On Mr Colman's evidence, he was working on the day of the incident in the grounds of his property in order to improve its appearance for resale purposes. At some point during the afternoon he asked a neighbour whether he could do some work on her garden as well. It appears from his evidence that he was concerned about the somewhat unkempt state of the neighbouring garden. He said he was told

the neighbour's garden was none of his business, and that he was to leave the property or the police would be called. Mr Colman walked back onto his own property and continued to work there.

[14] A little later in the afternoon, Mr Colman was visited by Mr Panther, who appears to have been associated in some fashion with the neighbour to whom Mr Colman had spoken earlier. Mr Colman's evidence is that Mr Panther appeared to be intent upon revisiting with him the exchanges that had occurred earlier in the afternoon between himself and the neighbour.

[15] Mr Colman did not wish to pursue that matter with Mr Panther, and asked him to leave his property. Mr Panther says he did so promptly. That evidence was accepted by Judge Tompkins at the trial. Mr Colman says that Mr Panther's evidence is simply wrong, and that by reference to the timing of telephone calls to the police and the subsequent time of their arrival at the scene, Mr Panther's evidence can be shown to be wrong. Indeed, Mr Colman believes Mr Panther to have perjured himself, and took the step of filing an information against him for perjury. The charge was later dropped because Mr Colman was in receipt of medical advice to the effect that his health was not such that he could continue to prosecute criminal proceedings.

[16] Wherever the truth lies, it is common ground that Mr Colman became very angry indeed at what he took to be Mr Panther's continuing trespass on his property. The following passage in the transcript of Mr Colman's evidence in chief before Judge Tompkins encapsulates the state of affairs then existing:

> And it escalated and I'm going to say that Mr Panther escalated the tone of his voice, that's not the issue. My voice became more and more escalated and I became more and more irritated as the minutes went by and to my absolute surprise, as I've put the circumstances together, quite substantially more minutes went by than I had ever realised, and eventually I was saying to him, 'Look, get off my property' and eventually that became, 'Get the fuck off my property or I'll bloody pulverise you, just get the fuck off my property'. At one stage and little did I know, but – ah that um, other neighbours by that stage had heard my – it was dinner time remember. People had come home from work and at that stage I thought I was all alone, I had nothing, and I was yelling so that neighbour could hear me. I was yelling so that there would be people aware of what was going on. I deliberately – remember deliberately – raising my voice to a pitch that my

> neighbours might come to my support. No, I didn't actually say the words to my neighbours, 'Help, help me'. I wish I had. If one reads the instruction book for situations like this, which I will write, I will make sure that people in future use the specific word 'Help' and I didn't. I was yelling to attract the attention of my neighbours and I succeeded. At the peak seven neighbours became aware of what was going on. One of those neighbours was across the road at number 50 Eureka Place by the name of Shayne Martin and he was at one stage – at the point that I have reached in my description of the events, Shayne was sitting on his hip height fence across the road standing there and every time I said to Mr Panther, 'Get the fuck off my property', Shayne Martin across the road was standing there applauding and yelling out, 'Yeah, give it to him John', and he was accompanied by three other neighbours from other houses in the cul-de-sac area, and they were all cheering me on and saying, 'Give it to him'.

[17] Mr Colman was eventually charged with using the expressions "cunts" "useless cunts" and "Christian cunts". At trial he accepted that he had used those words.

[18] Mr Panther called the police. Constables Calvert and Welsh attended the scene. After speaking to Mr Colman and others, Constable Calvert arrested Mr Colman for disorderly conduct. He was taken to the Whangarei police station and processed. Mr Colman complains about the way he was treated at the police station. I will return to this topic later in the judgment.

[19] On 19 December 2009 Mr Colman appeared in the Whangarei District Court and pleaded not guilty to the charge of disorderly conduct. He was remanded to 18 March 2008 for a defended hearing. Mr Colman says that he was ready to defend the case on that day. He appeared for the hearing and had organised a number of defence witnesses. But the police were not ready. When the case was called before Judge D G Harvey, the prosecuting sergeant indicated that Constable Calvert was not available to give evidence because his wife was in the latter stages of a difficult pregnancy. The police accordingly sought and obtained an adjournment over Mr Colman's opposition.

[20] He argues that what occurred amounted to a breach of the rights conferred upon him by s 25(b) of the New Zealand Bill of Rights Act 1990. From the bar, he contended that he had information to the effect that Constable Calvert was in fact engaged in police duties on the day of the hearing, and implied that the information conveyed to the Court by the prosecuting sergeant was therefore misleading.

Moreover, he maintains, information which later came to light reveals that the police had done little to prepare for a defended hearing and, in particular, had not arranged for police witnesses to appear on that day.

[21] Judge Harvey's refusal to proceed with the case on 18 March 2008 is the subject of Mr Colman's appeal in CRI 2009-488-15. The hearing of Mr Colman's case was adjourned to 16 June 2008. On 9 June 2008 the police laid a second information for the charge upon which Mr Colman was eventually convicted. But Mr Colman was not told about the new charge. Unfortunately, he remained in ignorance of it right through the hearing before Judge Maude on 16 June 2008. The charges were not read out to the appellant at the commencement of the trial, the Judge assuming no doubt that pleas of not guilty had already been entered.

[22] Judge Maude reserved his decision, which was delivered on 18 July 2008. Mr Colman was acquitted on the charge of disorderly conduct (the only charge of which he had been aware throughout the hearing), but convicted on the insulting language charge (of which he was ignorant until the delivery of Judge Maude's decision).

[23] On 28 July 2008 Mr Colman applied for a rehearing of the insulting language charge. The Crown opposed the application, but on 20 October 2008 Mr Colman's conviction was vacated and a rehearing was directed. On 10 November 2008, the Court directed that the case against Mr Colman be reheard on 2 March 2009. But on that day it was again adjourned. Several cases had been set down for that day. Mr Colman's case could not be reached. He argues that the Judge's decision not to accord his case priority amounted to a breach of s 25(b) of the New Zealand Bill of Rights Act. His appeal against Judge de Ridder's decision to adjourn, rather than hear, his case is CRI 2009-488-09.

[24] The rehearing of the case against Mr Colman eventually took place on 23 April 2009 before Judge Tompkins. At the conclusion of the hearing the Judge delivered an oral judgment in which he found the appellant guilty. Mr Colman was forthwith convicted and fined $250 with costs of $130. His appeal against that decision is CRI 2009-488-25.

[25] The remaining two appeals concern Mr Colman's attempts to launch the private prosecutions. The appeal in respect of Mr Calvert and the New Zealand Police is CRI 2009-488-018. The appeal in respect of various Ministers of the Crown is CIV 2009-488-19.

[26] It is convenient to deal with these two appeals at the outset.

The private prosecutions

[27] In twin judgments delivered on 25 March 2009, Judge McDonald declined to authorise the issue of summonses in respect of the private prosecutions launched by Mr Colman. In so doing he was exercising the Court's power under s 147(1)(a) of the Summary Proceedings Act 1957 as it then stood (see now s 150(1)) Section 147(1)(a) provided:

> **147 Issue of summons to or of warrant to arrest defendant**
>
> (1) When an information has been laid –
>
> (a) Any District Court Judge or Justice or Community Magistrate or the Registrar (not being a constable) may issue a summons to the defendant, in the prescribed form:

[28] The use of the word "may" connotes a judicial discretion. Before authorising the issue of a summons the Judge was required to consider whether there was some evidence to support the charges. The threshold is a low one; the provision is designed simply to weed out hopeless cases: *Daemar v Soper* [1981] 1 NZLR 66 at 70 (CA) and *De Montalk v Hobbs* [1999] DCR 1115 at 1129.

[29] In detailed judgments, Judge McDonald considered Mr Colman's proposed informations charge by charge and concluded that there was insufficient evidence to support any of them. Against those decisions Mr Colman wished to appeal. For that purpose he asked Judge McDonald to state a case for the opinion of this Court as to whether the decisions were " … erroneous in point of law".

[30] On 17 June 2009, Judge McDonald delivered a reserved decision in which he declined to state a case, upon the ground that there had been no determination of

Mr Colman's informations, and that accordingly, he had no jurisdiction to do so. Section 107(1) of the Summary Proceedings Act provides:

> **107 Appeal on question of law only by way of case stated**
>
> (1) Where any information or complaint has been determined by a District Court, either party may, if dissatisfied with the determination as being erroneous in point of law, appeal to the High Court by way of case stated for the opinion of that Court on a question of law only.

[31] Although the expression "determined" is not defined in the Act, it has been the subject of significant judicial consideration. For example, in *Dawson v Alexander Shand & Co Ltd* [1968] NZLR 922 at 926, Richmond J said that the word:

> … simply involves the notion that the information must have been disposed of in a final way as the result of an exercise by the Magistrate of his judicial functions.

[32] And in *Herewini v Ministry of Transport* [1992] 3 NZLR 482, Fisher J held that the determination of an information or complaint under s 115 of the Act:

> … will require that the prosecution be brought to an end by conviction or dismissal … or be otherwise disposed of in a final way by the Judge's exercise of his or her judicial functions …

[33] Section 109 of the Summary Proceedings Act provides:

> **109 District Court Judge or Justice may refuse a case if he thinks appeal frivolous**
>
> (1) If the District Court Judge or Justice or Justices are of the opinion that the appeal is merely frivolous, but not otherwise, he or they may refuse to state a case, and shall, on the request of the applicant for the case, sign and deliver to him a certificate of that refusal.
>
> (2) Where the District Court Judge or Justice or Justices refuse to state a case, the applicant for the case may apply to the High Court for an order requiring the District Court Judge or Justice or Justices to state a case. A copy of the application shall be served on the District Court Judge or Justice or Justices and on the other party, and the District Court Judge or any such Justice and that other party shall be entitled to appear and be heard.
>
> (3) The High Court may, if it thinks fit, make an order requiring the District Court Judge or Justice or Justices to state a case, and the District Court Judge or Justice or Justices on being served with the order shall state a case accordingly. Costs may be allowed on the application in accordance with the practice of the High Court, but shall not be allowed against the District Court Judge or any Justice.

[34] Judge McDonald having declined to state a case, Mr Colman seeks an order from this Court pursuant to s 109(3) requiring the Judge to do so.

[35] I am not prepared to make any such order. In my view the Judge was perfectly correct to decide that he had no jurisdiction to state a case because the essential precondition, namely the determination or dismissal of Mr Colman's informations, had not occurred. The procedural route by which the appellant was entitled to seek review of Judge McDonald's decisions was by way of application for judicial review. Mr Colman indicated at the hearing of the appeal that he did not propose to make any application of that sort.

[36] Appeals CRI 2009-488-018 and CRI 2009-488-019 must accordingly be dismissed.

The adjournment decisions

[37] Mr Colman has filed separate appeals against the decisions of Judge D G Harvey and Judge de Ridder who, on different occasions, granted an application by the police for an adjournment over Mr Colman's opposition. In these appeals Mr Colman relies upon s 115 of the Summary Proceedings Act which relevantly provides:

> **115 Defendant's general right of appeal to High Court**
>
> (1) Except as expressly provided by this Act or by any other enactment, where a District Court determines any information or complaint, and—
>
> (a) Convicts any defendant; or
>
> (b) Makes any order, including—
>
> (i) An order for the payment for costs; or
>
> (ii) An order declining an application for the payment for such costs; or
>
> (iii) An order for the estreat of a bond,—
>
> the person convicted or against whom the order is made may appeal to the High Court.

[38] Mr Smith submits that the Court has no jurisdiction to entertain these appeals because the orders granting an adjournment were not made "…where a District Court determines any information or complaint …". Mr Colman argues that there has been a sufficient determination.

[39] The limits of this Court's jurisdiction under s 115 have been discussed in a number of cases. A helpful summary appears in the decision of Fisher J in *Herewini* at 488:

> The scope of the jurisdiction conferred by s 115 has been the subject of numerous decisions, recent examples including *Police v S* [1977] 1 NZLR 1; *Black v Fulcher* [1988] 1 NZLR 417; and *Davies v Ministry of Transport* [1989] 3 NZLR 300. As I understand s 115(1) and those decisions, at least three conditions must be satisfied before there will be a right of appeal other than an appeal against orders for the estreat of a bond.
>
> First, the information or complaint in question must have been determined by the District Court. Ordinarily this will require that the prosecution be brought to an end by conviction or dismissal (*Black v Fulcher* at p 420) or be otherwise disposed of in a final way by the Judge's exercise of his or her judicial functions (*Davies v Ministry of Transport* at p 302). In the summary criminal jurisdiction, there is no provision for interlocutory appeals. If a ruling or order does not determine an information, the proper course is to hear the information on the merits so that if necessary the same point can be taken again in the context of an appeal against the conviction itself: *Black v Fulcher* at p 420; *Police v S* at p 5.
>
> Secondly the appellant must have been convicted or an order must have been made against him or her: see concluding words of the subsection and *Delaney v Police* at p 649. For this purpose, an order is made against a person if a judicial determination has resulted in a state of affairs which is adverse to his or her interests: *Police v S* at pp 4 and 5.
>
> Thirdly, if it is an order which is appealed against, the order may have preceded the conviction but must have been made in the course of determining the information or complaint: *Police v S* at p 4. It is sufficient if the order is so closely linked with the process of deciding the information that it can properly be described as being made in the course or process of so doing: ibid; *Black v Fulcher* at p 428.

[40] In *Grigson v Ministry of Fisheries* [1998] 3 NZLR 202, Giles J adopted the *Herewini* test and noted that although a temporal connection is not fundamental to the existence or exercise of a right of appeal (*Black v Fulcher*) there must nevertheless be a demonstrable link between the pre-trial determination and the substantive outcome. Where there is no such link, then the pre-trial decision simply becomes subsumed in the conviction. So in *Delaney v Police* [1980] 2 NZLR 648,

no right of appeal lay from a prior refusal to dismiss for prejudicial delay; in *Police v Norman* [1975] 1 NZLR 391, no appeal lay from a refusal to grant a rehearing; and in *David Bell Distributors v Police* HC PN AP22/98 21 April 1998, no appeal was held to lie from a refusal of an adjournment in summary proceedings.

[41] In my opinion, no appeal lies to this Court from the decision of the District Court to adjourn a summary proceeding. A decision to adjourn has, of itself, no sufficient connection with an ultimate conviction. Indeed, a decision to adjourn is the very antithesis of a determination of an information.

[42] If Mr Colman considered that either adjournment gave rise in the circumstances to undue delay, then it was open to him to apply to the District Court for a ruling to that effect. Although no appeal would lie to this Court from a refusal to dismiss the information for undue delay, there may well be a right to apply for judicial review. Moreover, as a matter of general principle, overall delay may be an issue on the hearing of the substantive appeal itself.

[43] I am satisfied that the Court has no jurisdiction to entertain Mr Colman's appeals in CRI 2009-488-18 and CRI 2009-488-19, which are accordingly dismissed.

The insulting language charge

[44] Mr Colman challenges his conviction on a number of grounds. His argument was supported by a detailed written synopsis (the material he provided to the Court exceeded 100 pages in all). He also addressed the Court at length. On appeal the hearing occupied about 1½ days, of which Mr Colman's argument occupied by far the greater time. He was thus able to advance his case on appeal in considerable detail.

[45] Of the various points taken by Mr Colman, I propose to start with an argument about the defence commonly known as "self defence", which he raised both at the hearing in the District Court and on appeal. To some extent his argument on this issue is relevant to other aspects of his case.

Self defence

[46] Before Judge Tompkins, the appellant sought to advance a defence to the effect that he was justified in what occurred because he was using reasonable force for the purposes of ss 48 and 56 of the Crimes Act 1961. Under s 48 he argued that Mr Panther's advance upon him constituted a threatened application of force, and he was therefore justified himself in using reasonable force.

[47] Under s 56 he wished to argue that he was justified in using reasonable force to prevent Mr Panther from trespassing on his property.

[48] As a matter of law Judge Tompkins ruled that neither ss 48 nor 56 applied. He restricted Mr Colman to cross-examination on the issues of whether he had used the language complained of (admitted by Mr Colman) and of whether he had been reckless or otherwise as to whether any person was insulted.

[49] Mr Colman argues that the Judge was wrong to so rule, and that the appellant had been improperly prevented from advancing his defence. Sections 48 and 56 of the Crimes Act respectively provide:

> **48 Self-defence and defence of another**
>
> Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.
>
> **56 Defence of land or building**
>
> (1) Every one in peaceable possession of any land or building, and every one lawfully assisting him or acting by his authority, is justified in using reasonable force to prevent any person from trespassing on the land or building or to remove him therefrom, if he does not strike or do bodily harm to that person.

[50] The defence under either of these sections can apply only if the accused used or threatened "force". In *Bayer v Police* [1994] 2 NZLR 48 (CA) it was held that the acts of a number of people in blockading premises by passively sitting in the entrances to them, did not constitute "force" in the absence of any overt or implicit implication that physical force would be used if necessary.

[51] Earlier, in *Ihaia v Police* [1982] 2 NZLR 211 at 214, Woodhouse P said:

> In the absence of threatening attitudes by those present or conduct indicating a readiness to be physically aggressive the presence of mere numbers would not amount to a display of force.

That case concerned picketing by physical presence across an entranceway.

[52] In my opinion the defence provided by ss 48 and 56 is concerned with the application or threatened application of physical force, and not with mere words, however bad the language, unless the words used indicated a readiness to engage in physical aggression. That is the evident purpose of the defence, as is explained by the decisions of the Court of Appeal by which this Court is bound.

[53] Mr Colman nevertheless argues that the word "force" is a relic. He says in some Australian states there is legislation which refers to "reasonable conduct" rather than "force". He refers also to a decision of the Privy Council in a Jamaican case: *Palmer v R* [1971] AC 814 (PC) 282. He places particular emphasis on a passage in the decision of the Privy Council where it was said:

> If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary, that would be most potent evidence that only reasonable defensive action had been taken.

[54] Mr Colman places stress upon the phrase "reasonable defensive action". But a little earlier in that passage the Privy Council had explicitly referred to an "attack" and to " … the employment of force …" by way of defence.

[55] In this country the law is that the defence afforded by ss 48 and 56 applies only where an accused person seeks to justify a physical attack or the threat of a physical attack. That did not occur here. Mr Colman simply swore and was ultimately convicted of an offence arising from the language he employed. There is no evidence that he used, or threatened to use, physical violence. The District Court Judge was therefore quite right to rule out the appellant's intended reliance on ss 48 and 56, which were of no relevance at trial.

Undue delay

[56] Section 25(b) of the New Zealand Bill of Rights Act 1990 provides that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be tried without undue delay. In the leading case in New Zealand, *Martin v District Court at Tauranga* [1995] 2 NZLR 419, the Court of Appeal emphasised that each case will turn on its own facts, and that in particular there must be an inquiry as to the causes of the delay, and as to the existence of prejudice to the accused.

[57] Here, the total delay was of the order of 18 months. For a relatively minor charge a delay of that sort is highly regrettable. Mr Colman had no responsibility for it at any point. In essence, the delay arose from:

a) The unavailability of a police witness on the day of the first fixture;

b) The listing of too many defended cases on the one day on the second fixture date;

c) The grant of a retrial following procedural irregularity (the failure to take a plea) at the first trial.

[58] Mr Colman argues that the police witness was not in fact unavailable on the day of the first trial, and that the prosecution misled the Court on that point. He asserts from the bar that the officer concerned was actually on duty on the day in question, and that the Court was improperly told that the officer was with his wife, who was in the late stages of a difficult pregnancy.

[59] Mr Colman accepts that his contention is based on hearsay information, and of course there is no sworn evidence about it. It would not be right to accept, on the appellant's uncorroborated assertion, that the police misled the Court, or that the delay was avoidable. Likewise, there is no sworn evidence to support his contention that the other police witnesses were not ready either.

[60] The second adjournment was systemic, in the sense that it arose from scheduling arrangements made within the District Court system. No blame can be apportioned to either party for that, although Mr Colman complains that he was given no reason as to why his case was relegated in priority in comparison to others.

[61] Finally, there was the need for a retrial. It is impossible to apportion responsibility for that either, although it might be argued that the prosecutor ought to have been aware of the fact that Mr Colman had not been advised of the newly laid charge at the time of the first trial.

[62] The circumstances are not such as to suggest immediately that the delay here should of itself have led to a stay, unless the appellant was prejudiced. As to that, Mr Colman strongly asserts that he was prejudiced, in that he had arranged for several witnesses to give defence evidence on the date of the first hearing. Thereafter, those potential defence witnesses lost interest, or became discouraged by Court processes he says, and when the case eventually went to trial, he was unable to call several witnesses who would have assisted his defence.

[63] However, in argument, Mr Colman indicated that the witnesses concerned were not intended to rebut the Crown claim that the alleged insulting words were used by the appellant. The use of the words concerned is admitted. Rather, he wished to call his witnesses in order to give evidence of surrounding circumstances, and in particular, the role of Mr Panther. As discussed below, issues relating to Mr Panther's entry on to the appellant's property and the length of time he remained there were largely irrelevant. Mr Panther's presence on his property plainly enraged Mr Colman, and so provided the setting for the use of insulting language. But the fact that the appellant may have been provoked cannot be relevant to the question of criminal liability (although it may be a factor to be taken into account in mitigation).

[64] So the witnesses Mr Colman proposed to call were largely irrelevant to the case, and in particular largely irrelevant to Mr Colman's defence. It may well have been that he intended to call them in order to give evidence of surrounding circumstances so as to support the claim that he was acting in self-defence, or in

defence of his property, but that is a defence which the appellant was not entitled to run.

[65] Accordingly, the appellant suffered no special prejudice arising from the delay. I accept of course, that he must have suffered a degree of prejudice in the more general sense, especially as he is a man of impeccable character who had never before faced a criminal prosecution. I accept that this case was nothing short of an ordeal for him. But having said that I am not satisfied that the delay reached the point at which it could be said that his rights under s 25(b) of the New Zealand Bill of Rights Act had been infringed. The appellant was on bail throughout. The charge he faced was comparatively minor, and did not carry a sentence of imprisonment. The delays were largely systemic. Moreover, the ordinary remedy for a breach of s 25(b) is a stay of proceeding: *Martin* at 424. Mr Colman was at liberty at any stage to make an application for a stay but did not do so. As I hold in this judgment the appellant was rightly convicted.

[66] In all the circumstances of this case, I do not consider that the various delays encountered by Mr Colman were such as to warrant the quashing of his conviction.

Double jeopardy

[67] At the commencement of the hearing before Judge Tompkins on 23 April 2009, Mr Colman endeavoured to enter a plea of autrefois acquit. Judge Tompkins declined to accept that special plea. The appellant then entered a plea of not guilty and the trial proceeded in the usual way.

[68] Mr Colman argues that the Judge's decision to decline to accept the plea of autrefois acquit was wrong. He relies, not upon his previous acquittal on the disorderly conduct charge, but upon the course of events that followed the first trial. That trial ended with the appellant's acquittal on the charge of disorderly conduct but a conviction on a charge of insulting language, of which the appellant was unaware at the time of the trial, and upon which he was never asked to plead.

[69] The appellant sought to appeal against his conviction. Judge Maude became aware of the procedural defects in the first trial, and the appellant was subsequently given to understand that an application for a rehearing would be favourably considered. He made that application, in consequence of which his conviction was quashed and a retrial ordered.

[70] Mr Colman's contention is that his retrial and subsequent conviction breached the provisions of s 26(2) of the New Zealand Bill of Rights Act which provides that:

> No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

[71] In my opinion Judge Tompkins was perfectly correct to decline to accept Mr Colman's plea of autrefois acquit. Section 67(1) of the Summary Proceedings Act 1957 provides:

> Before any charge is gone into, the substance of the charge shall be stated to the defendant if he appears, and he shall be asked how he pleads.

[72] The provisions of that subsection were not complied with in respect of the new charge of insulting language. The provisions of the Summary Proceedings Act are peremptory. I accept Mr Colman's submission that, in consequence of a fundamental failure to comply with the provisions of s 67(1) of the Summary Proceedings Act, his trial on the charge of insulting language miscarried, and was effectively a nullity. It was against that background that the District Court granted his application for a rehearing, and in so doing set aside the conviction on that charge.

[73] Judge Tompkins considered that Mr Colman had not been "finally acquitted" for the purposes of s 26(2) of the New Zealand Bill of Rights Act, and that accordingly the special plea of autrefois acquit was not available to him. Mr Colman asserts however that the provisions of s 26(2) ought to be accorded a purposive approach, that he himself was in jeopardy for a second time in that he was back before the Court, facing the same charge. But as was recognised by the grant of a rehearing, Mr Colman was not in fact in jeopardy at his first trial, which was a

nullity insofar as the insulting language charge was concerned. Moreover, Mr Colman himself was not even aware that he might have been in jeopardy on that charge on that first occasion.

[74] The word "finally" in s 26(2) simply reflects the settled principle that a criminal proceeding must be finally determined before a previous acquittal or conviction may be advanced by way of special plea on a subsequent occasion. Mr Colman seeks to rely upon the setting aside of the conviction at the time of the grant of the rehearing. The order so made did not amount to a final acquittal; it was simply an order setting aside the conviction that resulted from a trial that was a nullity, in order that Mr Colman might be properly tried. The order made on the rehearing could not possibly be described as an "acquittal", let alone a "final acquittal". It was merely an order setting aside a conviction.

[75] Judge Tompkins was right to reject Mr Colman's special plea and to require him to enter a plea of not guilty in the usual way.

Disclosure issues

[76] Mr Colman complains of tardy disclosure by the police and says that in consequence he was hampered in the preparation of his defence. In particular, he says he was provided with police witness statements at a relatively late stage, and that delayed the preparation of his defence. He is also critical of the state of the police file which he was permitted to inspect in company with Inspector Hodson of the Whangarei Police on 15 December 2008. Mr Colman indicates there was very little material of interest on the police file and it was plainly incomplete.

[77] It is difficult to deal with Mr Colman's argument on this point without detailed (and sworn) evidence. But it is plain that he did eventually obtain access to all the material he needed to prepare his defence, at least for the second trial before Judge Tompkins. Indeed, His Honour expressly referred to disclosure issues in his oral judgment of 23 April 2009, where he said at [10]:

> [10] I also record that Mr Colman did raise, in his submissions, irrelevant issues as to alleged non-disclosure prior to an earlier hearing of this matter

> on 16 June 2008, but in the context of this hearing, no such omission to disclose can have any impact as, since that hearing, and indeed prior to that time on the material I have, full and complete and appropriate disclosure has been made to Mr Colman in a timely fashion in order for him properly to prepare for today's hearing.

[78] The appellant's disclosure problems, such as they were, did not prevent him from advancing his defence at trial.

Destruction of evidence

[79] Mr Colman says that the preparation of his defence was significantly impaired because the "crime scene" was interfered with during the appellant's period in custody and before he returned home on police bail.

[80] As the result of the gardening activities in which he had been engaged just prior to the incident which led to his arrest, a quantity of garden rubbish, including cut grass, trimmings and so forth, was lying about, on and near his property. When Mr Colman returned to the scene, a clearance had been effected by a neighbour and the rubbish was gone. Mr Colman had intended to take photographs of the scene, presumably in order to support the evidence he wished to give about the circumstances in which he came to utter the words complained of. Those circumstances included the tidying up of his garden.

[81] In my opinion the loss of an opportunity to take photographs of the scene could not possibly have affected the conduct of Mr Colman's defence. It was not in dispute that he was tidying up the grounds of his property, and in any event evidence about that could have served only to provide a background to the real issue in the case, namely whether Mr Colman did use the words complained of (admitted by him), and whether he was reckless as to whether any person was insulted by those words.

[82] The defence case could not possibly have been adversely affected by the actions of a neighbour in tidying up garden rubbish in Mr Colman's absence.

Police failure to arrange medical attention

[83] Mr Colman is a diabetic, and has multiple health problems. At the time of the incident and during the time spent in custody (some three hours), he was under severe mental and physical strain. He believes that at the time that the relevant insulting words were spoken he not only "lost it" (as he concedes), but that he was incapable, by reason of his health problems, of forming the necessary criminal intent. In other words, there was no mens rea. Upon his apprehension he believed he was suffering from a diabetic incident, and indicated to Constable Calvert (the arresting officer), that he needed medical assistance. The Constable said in evidence that he suggested to Mr Colman that they return to the latter's residence in order to retrieve his medication, but that Mr Colman declined to do so because that would involve passing near hostile neighbours.

[84] At the police station, the appellant asked both Constable Calvert and the watchhouse keeper for medical assistance but it was not forthcoming. Constable Calvert said from his assessment (and he had some experience of diabetics) the appellant was not in need of urgent medical advice.

[85] After about three hours Mr Colman was released and permitted to return home. Fortunately there were no serious health repercussions, but he nevertheless argues that because the police declined to contact his general practitioner, a possible defence was lost to him.

[86] His argument is that he was traumatised on the day in question, to the point at which he was incapable of forming the necessary intention to commit the offence. But in order to mount such a defence he needed the support of a medical witness. Had his doctor (his general practitioner for 10 years) been summoned to the police station, then an examination might have revealed that the appellant was indeed in such a state that he was incapable of forming the necessary intent. But the doctor was not called and the opportunity was lost.

[87] Mr Colman likens this case to *R v Donaldson* [1995] 3 NZLR 641. There the appellant was found asleep in the driver's seat of a motor vehicle, stopped with its

lights on at a stop sign. She was asked to get out of the car, and when she did she appeared to be unsteady on her feet. She claimed she had recently consumed one glass of beer. A breath screening test was administered and proved negative. However, her gait and speech caused the constable to conclude that the appellant was under the influence of some substance and she was arrested for driving under that influence. She was taken to a police station and told she would undergo an examination by a doctor. She asked that a sample of her blood be taken, and was told one would not be taken. Similar responses were given to further requests from the appellant. She consented to an examination by a doctor who formed the opinion that the appellant was clinically under the influence of drugs and alcohol, and unfit to drive the motor vehicle safely. The appellant was convicted; her appeal was dismissed in the High Court, but leave having been granted to appeal to the Court of Appeal, that Court held that, although there was no question of bad faith on the constable's part in refusing to arrange the taking of blood, the refusal to do so placed the case in the category of obstruction of the right to prepare a defence recognised in s 24(d) of the New Zealand Bill of Rights Act.

[88] Mr Colman contends that this case is on all fours with *Donaldson*. I am unable to accept that submission. In *Donaldson* there was a clear correlation between the evidence denied to the appellant (the conduct of a blood test) and the outcome of the charge upon which she was ultimately convicted. A blood test result consistent with the appellant's evidence that she had consumed only one glass of beer, would undoubtedly have given rise to a sufficient doubt to result in the appellant's acquittal. The present case is quite different. Nothing in the surrounding circumstances suggests that a medical examination of the appellant during the period of his incarceration at the police station, might have led to evidence that could have resulted in an acquittal.

[89] In order to escape liability once the elements of the alleged offending had been established, Mr Colman would need to rely upon s 23 of the Crimes Act (insanity), or possibly the defence of non-insane automatism. There appear to be no other options.

[90] In his decision Judge Tompkins noted Mr Colman's defence at trial, namely that he denied any intent to insult and was suffering a panic or anxiety attack, or flight or fight response, to such a degree as to be unable to form the requisite criminal intention. The Judge found that the offending resulted from a loss of temper on the appellant's part, and that Mr Colman was aware the words he was using would be likely to insult any person who heard them. Indeed, the Judge noted (and as appears in the passage from the evidence reproduced earlier in this judgment), Mr Colman himself admitted that he had deliberately elevated the volume of his own voice specifically so that his neighbours would hear him.

[91] Against that background, it was incumbent upon the appellant to do more than simply assert on appeal that his health was such at the time of the incident that he ought to escape criminal liability. At the very least there should have been an affidavit from his general practitioner or some other suitably qualified person covering the alleged offending and Mr Colman's medical condition, and outlining what might possibly have been gleaned had he been examined during his period in custody. Mr Colman indicated to the Court that he did get medical attention from a registered nurse later that same evening. But there is no sworn evidence to suggest, for example, that a medical examination conducted say two hours after the incident might have turned up something of use to the defence, whereas an examination after four or five hours would not.

[92] This case is quite different from *Donaldson* in that here the link between the offending on the one hand and the availability of useful defence evidence on the other, is no more than an exercise in speculation.

[93] On appeal, the Court is unable to disturb the lower Court finding simply on the basis of Mr Colman's contention that, had a medical examination been conducted while he was in custody, a medical practitioner might have found something to suggest that the appellant was, several hours earlier, either insane for the purposes of s 23 of the Crimes Act, or alternatively, acting at that time in a state of near insane automatism.

Conclusion

[94] Mr Colman maintained on appeal that he had no intention of breaking the law, and was not a criminal. I accept that assurance to the extent that he did not intend to commit a criminal offence. But the Judge was entitled and indeed bound to find that Mr Colman had deliberately uttered the words which, as matters turned out, did constitute a criminal offence. It is plain enough that he was in a sense provoked, but the existence of a state of affairs aggravated by Mr Panther's presence on his property does not in law provide a justification for the use of language that was, on any view, insulting in the circumstances. The Judge was in my opinion right to find the appellant guilty.

[95] By the conclusion of the appellant's very detailed argument, which provided me with some insight into the offending and into Mr Colman's background and history, it seemed to me this was a case in which a discharge under s 106 of the Sentencing Act 2002 might be considered. The question was not raised in the lower Court, partly no doubt because Mr Colman was self-represented.

[96] At the end of the appeal hearing I invited Mr Colman to consider whether he wished to make an application for a discharge. Subsequently he elected to do so and filed very detailed submissions in support of the application. Mr Smith filed brief focused submissions in which he contended that the Court might very well reach the view that in all the circumstances it would not be proper to discharge Mr Colman.

Discharge without conviction

[97] Upon finding the appellant guilty at his first trial, Judge Maude simply convicted him and directed that he come up for sentence if called upon within six months. But in passing sentence on 23 April 2009, Judge Tompkins took a different line. He said that:

> … bearing in mind the submissions you have advanced which, in my view, reiterate again your lack of appreciation of the effect of your actions that day and your inability to accept responsibility for them, you are convicted and fined $250. Court costs $130.

[98] There is a note of exasperation in the Judge's sentencing remarks, stemming clearly enough from Mr Colman's tendency to take every possible point, however meritless in his defence. Mr Colman complains that he was in effect penalised twice for the same offence, in that he had served the first sentence before the second was imposed. That is a consequence of the retrial. Nothing much turns on Mr Colman's technically correct contention, because he served the first sentence simply by escaping further police attention.

[99] The present question for the Court is whether Judge Tompkins ought to have convicted and fined the appellant or whether, as Mr Colman now argues, it was appropriate for him to be discharged without conviction.

[100] The jurisdiction of the Court to discharge without conviction is conferred by ss 106 and 107 of the Sentencing Act 2002 which relevantly provide:

> **106 Discharge without conviction**
>
> (1) If a person who is charged with an offence is found guilty or pleads guilty, the court may discharge the offender without conviction, unless by any enactment applicable to the offence the court is required to impose a minimum sentence.
>
> (2) A discharge under this section is deemed to be an acquittal.
>
> (3) A court discharging an offender under this section may—
>
> (a) make an order for payment of costs or the restitution of any property; or
>
> (b) make any order for the payment of any sum that the court thinks fair and reasonable to compensate any person who, through, or by means of, the offence, has suffered—
>
> (i) loss of, or damage to, property; or
>
> (ii) emotional harm; or
>
> (iii) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property:
>
> (c) make any order that the court is required to make on conviction.

> **107 Guidance for discharge without conviction**
>
> The court must not discharge an offender without conviction unless the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

[101] The application of these sections was recently discussed by the Court of Appeal in *R v Hughes* [2009] 3 NZLR 222. There, the Court noted that despite the heading to s 107, "Guidance for discharge without conviction", the provisions of the section are mandatory. In consequence, no Court may exercise its discretion under s 106 to discharge without conviction unless it is satisfied that the consequences of a conviction would be out of all proportion to the gravity of the offence. As was said in *Hughes* (at [8]):

> … Section 107 thus provides a gateway through which any discharge without conviction must pass. It stipulates a pre-condition to exercise of the discretion under s 106.

[102] In *Hughes*, the Court of Appeal confirmed that the criminal law disproportionality test discussed in such cases as *Fisheries Inspector v Turner* [1978] 2 NZLR 233 (CA) and *Police v Roberts* [1991] 1 NZLR 205 (CA) had not been departed from in s 107. The Court said in *Hughes* (at [41]):

> In summary, the parameters within which the disproportionality principle operates have not been changed by s 107. Application of the disproportionality test under s 107 requires consideration of all relevant circumstances of the offence, the offending and the offender, and the wider interests of the community, including the factors required by the Sentencing Act to be taken into account under ss 7, 8, 9 and 10. Having taken account of those factors, the Judge must determine whether the s 107 test is met and whether it is appropriate that he or she makes an order under s 106 to deal with the offender.

[103] The appellant does not carry an onus to establish that the disproportionality test has been met. Rather, in terms of s 107, the Court may discharge without conviction "… if satisfied" that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence. As explained in *R v Leitch* [1998] 1 NZLR 420 at 428, the need to be "satisfied" simply involves the exercise of judgment by the Court; it is inapt to import notions of burden and standard of proof.

[104] In *Hughes*, the Court of Appeal confirmed the continuing applicability of the three-step approach suggested in *Turner* and in *Roberts*:

a) Identification of the gravity of the offending by reference to the facts of the particular case;

b) Identification of the direct and indirect consequences of a conviction;

c) Determination of whether the direct and indirect consequences of conviction would be out of all proportion to the gravity of the offending.

[105] On any view, this was minor offending. The offence itself carries a maximum penalty of a fine of $1000. A discharge without conviction may be considered where the offence is relatively minor, and there are substantial mitigating factors: *Lee v Police* HC AK CRI 2005-404-28 27 July 2005.

[106] It is not possible to defend the appellant's language on the day in question, but there are mitigating factors. Mr Colman's language was used in response to what he understood to have been a developing situation which posed some threat to him. His response was, of course, completely inappropriate, but this was not a case in which the offender simply used the language gratuitously, in order to insult, without any previous interaction with the complainants. Then there is the question of his health, which is plainly not good. He told the Court that he had been diabetic for some 25 years or more, and that he had a number of consequential health problems. Diabetics can suffer rapid mood swings as their sugar levels alter. In particular it is well established that persons with diabetes, with little notice, can become confused, angry, and frustrated when sugar levels drop. There may therefore be a medical explanation for what seems to have been offending that was quite out of character.

[107] Mr Colman is 60 years of age and has no previous convictions. For much of his working life he was a member of the Diplomatic Service. Notably, he served in Iraq at a time when life there, even as a diplomat, cannot have been easy.

[108] Mr Colman expresses concern that the cases in which discharges have been granted under s 106 tend to be those in which relatively young offenders have been able to point to potential difficulties in respect of forthcoming travel and employment. As a matter of practical experience that is probably so. Nevertheless, in my judgment it is relevant for the Court to take into account the case of an older offender who is able to point to a blemish-free record stretching over decades, coupled with a history of service to the community. The loss of a clean record is a matter of considerable significance to such a person. There is no doubt that the Court is able to take such considerations into account: see for example the judgment of Rodney Hansen J in *Steele v Police* HC ROT CRI 2007-463-151 11 February 2009 at [36].

[109] Mr Smith argues that there is no evidence of any concrete disadvantage to the appellant as the result of the conviction. That is so, but I am satisfied that the range of relevant considerations is not confined to identified practical problems. In my opinion this offending resulted from an interaction between neighbours which simply got out of hand. It is minor offending of the type suited to a discharge without conviction where the circumstances of the offender warrant that course. In my opinion Mr Colman's circumstances do justify a discharge. Accordingly, the conviction is quashed, and he is discharged without conviction.

Costs

[110] Mr Colman has failed on four of the five appeals. On the fifth he received an indulgence. Those upon which he was unsuccessful occupied approximately a half day of hearing time. There will be an order directing Mr Colman to pay to Mr Smith as counsel for the active respondents in those four unsuccessful appeals, the sum of $226, pursuant to the Costs in Criminal Cases Act 1967.

Postscript

[111] Generally, in cases where the Court considers it to be appropriate to discharge an offender without conviction, there is evidence of significant remorse on

the offender's part. Here, although Mr Colman is plainly regretful about what occurred, there is limited evidence of remorse. Indeed, although accepting that he used the words complained of, he has endeavoured to avoid responsibility by mounting a series of arguments, few of which are of any substance.

[112] Having said that, Mr Colman has not been well served by the criminal justice system, and there is considerable weight in his complaint that he has been subjected to an ordeal that ought never to have occurred.

[113] There is a further point. Mr Colman is an articulate and intelligent man. He has employed his skills in producing voluminous submissions in this Court. Some of his material has been focused on arguments of relevance to the appeal, but much has simply been irrelevant. Unfortunately, Mr Colman seems to believe that he is entitled to ascribe to members of the judiciary motives that are quite out of keeping with the judicial oaths which each and every Judge in this country must swear. He has appeared in this case before five separate District Court Judges. Against each of them he has made allegations of incompetence. Against some he has alleged partiality and, indeed, outright dishonesty.

[114] He has complained to the Judicial Conduct Commissioner and is critical of him for failing to process the complaints in a manner that satisfies the appellant. He is also condemnatory of the stance adopted by the Crown Solicitor at Whangarei, Mr Smith, who appeared at the hearing of the appeal.

[115] I can only agree with the comments of Judge McDonald, who observed, in a judgment in which he refused to authorise the issue of summons at the behest of the appellant, that Mr Colman has allowed himself to become obsessed by what occurred in this case. As a result that he has been unable to express himself in language which might have been thought to be second nature to a retired diplomat.

[116] Mr Colman's attacks on the integrity of the judiciary were utterly without foundation, and expressed in completely inappropriate language. He ought to have known better. Some may consider that Mr Colman should thereby be disqualified from consideration for a discharge. I have reflected carefully on that point, but

remain of the view that the appellant is entitled to be discharged. If that should be thought to represent a somewhat generous application of the Court's jurisdiction, then so be it.

C J Allan J