IN THE COURT OF APPEAL OF NEW ZEALAND CA 315/96

THE QUEEN

V

PHILLIP JOHN SMITH

Hearing:	10 July 2002
Coram:	Elias CJ Anderson J Glazebrook J
Appearances:	SP France for Crown (Applicant) A Ellis and A Shaw for Respondent GDS Taylor for Legal Services Agency
Judgment:	19 December 2002

JUDGMENT OF THE COURT DELIVERED BY ELIAS CJ

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The application

[1] The application concerns the effect of Part II of the Crimes (Criminal Appeals) Amendment Act 2001 on the 1996 determination of an appeal under an "*ex parte*" procedure formerly used by this Court for criminal appeals. The Privy Council in *Taito v R* (2002) 6 HRNZ 539, [2002] UKPC 15 held that the determinations of twelve appeals under the *ex parte* procedures were invalid and remitted all for hearing in the Court of Appeal. Phillip John Smith was not one of the petitioners in the Privy Council. His 1996 appeal against conviction and sentence for a number of charges, including murder, had however been dismissed after a similar *ex parte* hearing. On the basis of the conclusion reached in *Taito* Mr Smith asked that his appeal be set down again.

[2] Counsel for the Crown and the appellant had agreed on this method to bring the matter before the court so that the implications of the decision in *Taito* for appeals similarly disposed of can be confronted. Mr Smith asked the Registrar to list his appeal for oral hearing on the basis that the 1996 determination is a nullity. The Crown then filed an application to set aside the fixture on the grounds that the court has no jurisdiction to re-hear an appeal which has been finally determined other than on referral by the Governor-General under s406 of the Crimes Act or if leave to rehear is granted under s15 of the 2001 Amendment Act. It is the Crown's application to vacate the fixture which is the subject of this judgment.

[3] It was accepted by the Crown that the determination of Mr Smith's appeal in 1996 was invalid, in application of the reasoning in *Taito.* Although it is necessary to determine the point formally, counsel for the Crown did not greatly resist the conclusion that the 1996 decision is not validated by the 2001 Amendment Act. The real question raised by the application is what is now to be done. Although the application is brought by one appellant, an estimated 1500 others are similarly placed. They are appellants who, since appeal became available as of right in 1991, have had their appeals dismissed without oral hearing under the *ex parte* procedure.

[4] The 2001 Amendment Act does not prevent those affected from petitioning the Privy Council for leave to appeal. Since the Privy Council in *Taito* has already determined that the procedures followed were unlawful and the consequential determinations invalid, requiring that course to be followed would be wasteful and would abdicate responsibility to correct demonstrated error. A less formalistic approach is acknowledged by the parties to be required where the human rights to minimum standards of criminal procedure and justice recognised by s25(a) and (h) and s27 of the New Zealand Bill of Rights Act are engaged.

[5] The parties do not however agree as to the course available. Counsel for the Crown contends that the appellant and others similarly placed may make application for re-hearing under s14 of the 2001 Amendment Act. Re-hearings are available under s15 by leave of the court for specified failures in procedure (acknowledged to have occurred here) where the court is satisfied that there is an arguable case that a miscarriage of justice has occurred. Where such leave is granted, the appeal is reheard under the procedures adopted by the 2001 Amendment Act. They authorise a Judge of the Court of Appeal to direct that the appeal be heard either by oral hearing or on the papers. Counsel for Mr Smith maintain that the Court should establish a procedure to set down and determine by oral hearing all appeals dealt with *ex parte* between 1991 and 2001, on the basis that they have never been validly heard. On that view, the mode of hearing provisions in the 2001 Amendment Act are said to have no application.

[6] For the reasons which follow, we have concluded that the fixture must be vacated. Mr Smith may make application for re-hearing of the 1996 appeal under the inherent powers of the Court.

Background

[7] Since 15 August 1991, those convicted on indictment have been entitled to appeal to the Court of Appeal as of right (Crimes Act 1961, s383; New Zealand Bill of Rights Act 1990, s25(h)). The legislative provisions which between 1991 and 2001 governed the rights of appeal are explained in *Taito.* The Privy Council held that the legislation contemplated the preparation of forwarding of a case on an appeal

to each appellant, that an appellant was entitled to an oral hearing of the appeal and that there would be a judgment by and in accordance with the opinion of the Judges who had heard the appeal.

[8] The practices followed by this Court during the same period are also described in *Taito* and need not be repeated at length. In brief, the practice for the determination of criminal appeals varied according to whether the applicant was represented by counsel (either privately instructed or through grant of legal aid) or not. For most appellants the availability of representation depended upon whether legal aid was granted. No case on appeal containing the trial transcripts, summing up, and sentencing notes was made available to appellants unless they were represented by counsel. The power to grant legal aid was conferred by legislation upon the Registrar of the Court, but was in practice exercised by three judges of the Court who each considered the file separately. Where legal aid was declined and the appellant was not legally represented by privately retained counsel, the appeal was decided "*ex parte*", without the appellant being present and on the papers. In effect, the opinions of the three judges who considered the legal aid application on the papers became the decision of the court on the substantive appeal. If written submissions had been received, a written "*ex parte*" judgment was prepared, usually by one of the judges who had earlier declined legal aid and in the names of the three judges who had considered legal aid. It was read out in Court, but the bench did not necessarily include all or even any of the three legal aid judges. If no written submissions were received, no written judgment or reasons were given. In that case, the appeal was formally dismissed at a sitting of the Court which did not necessarily include all or any of the legal aid judges.

[9] Mr Smith gave notice on 16 August 1996 of intention to appeal against his convictions and against the sentences imposed. The grounds identified included trial judge error in directing that self-defence was not available to the charge of murder, and in refusal of leave to further cross-examine the complainant on later evidence said to be relevant to the issues of consent. The sentences imposed, which included a minimum non-parole period of 13 years for murder, were said to be excessive. The notice of appeal sought legal aid. Mr Smith did not seek leave to be present at the hearing of the appeal.

[10] The file was circulated among three judges, in accordance with the practice of the Court. The file contained a summary of facts prepared by a clerk, and the recommendation of the first judge that legal aid be refused. Two judges minuted the file that they agreed with the recommendation. The Registrar noted the file on 14 November 1996

> after consultation with 3 Judges legal aid refused; it not being in the interests of justice. Applicant to have 28 days to file written submissions in support of appeal.

[11] Mr Smith forwarded handwritten submissions in support of his appeal. In addition to the grounds identified in the notice of appeal, he claimed that much of the evidence given at trial was untrue, and indicated that he could demonstrate as much through evidence he could give himself. (He had not given evidence at the trial.)

[12] A judgment dismissing the appeal with reasons was prepared by one of the judges who had taken part in the decision to decline legal aid. The judgment was prepared in the names of the three judges who had participated in the legal aid decision. The appeal was listed before a divisional Court which included the Judge who had first recommended against legal aid. The other members of the Court were however judges who had not participated in the legal aid decision and who are not named as the Court in the *ex parte* judgment. There is no suggestion that these two members of the Court were familiar with the case or turned their minds to its merits. The file is noted that the divisional Court on 19 December 1996 formally dismissed the appeal "*ex parte*".

[13] Following concerns expressed in *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 about the involvement of Judges of the Court of Appeal in legal aid determinations, the Legal Services Act 2000 removed the decision as to legal aid from the Registrar of the Court of Appeal and placed it with the Legal Services Agency. Judges of the Court of Appeal no longer consider applications for legal aid.

[14] In the meantime, a number of petitions to the Privy Council had challenged the legality of the practice of the Court of Appeal in determining appeals "*ex parte*"

and, if no submissions were received, without reasons. Parliament enacted amending legislation before the petitions were heard in the Privy Council, in apparent acceptance that the procedure for *ex parte* or "on the papers" determination of appeals was not expressly authorised by the Crimes Act and was arguably invalid.

Crimes (Criminal Appeals) Amendment Act 2001

[15] The Crimes (Criminal Appeals) Amendment Act 2001 has two parts. Part I establishes new procedures for the hearing of criminal appeals by the Court of Appeal. In particular, it authorises determination of appeals on the papers.

[16] Part II does not effect any amendment to the principal Act. It validates the determination of an appeals made before the commencement of the Amendment Act in certain circumstances. Notwithstanding such validation, Part II provides for rehearing by leave where an arguable miscarriage of justice exists.

[17] Section 13 provides for the validation of appeals heard under the former legislation:

> **13. Validation of determinations made before Act commences**
>
> (1) No determination of an appeal or application for leave to appeal that was made under Part XIII of the principal Act before the date on which this Act commences is invalid by reason only of any 1 or more of the following:
>
> (a) a failure to comply with Part XIII of the principal Act or the Court of Appeal (Criminal) Rules 1997 (as the Act and Rules were at any time before the commencement of this Act):
>
> (b) a failure to comply with the Criminal Appeal Rules 1946:
>
> (c) a failure to give reasons for the determination or judgment.

[18] Specifically exempted from the application of this validation by s13(2) were the petitions then before the Privy Council, *Fa'afete Taito v The Queen* (petition for special leave to appeal, CA 4/96) and *James McLeod Bennett and 11 Others v Attorney-General and 2 Others* (CP 108/00).

[19] Despite the general validation, Parliament provided a safety net to ensure that no miscarriage of justice in a particular case would be created by s13. Section 14 permits someone whose appeal was determined *ex parte* to apply for leave for a re-hearing. Under s14(1) an application can only be made by someone:

> (a) who appealed, or applied for leave to appeal, under Part XIII of the principal Act before the date of commencement of this section; and
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> (b) who applied for legal aid in respect of the appeal or application, but was not granted legal aid in respect of it; and
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> (c) whose appeal or application was determined without oral submissions being heard; and
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> (d) whose appeal or application was dismissed.

[20] The application for leave for re-hearing must be made before a cut-off date to be set by Order in Council which cannot be made "until at least 1 year after" the date at which *Taito* and *Bennett* are "finally determined" (s14(2) and (4)). Under s14(3)

> (3) An application for a re-hearing must-
>
> (a) identify a failure of the sort described in any of paragraphs (a), (b), or (c) of section 13(1) that occurred in relation to the original appeal or application; and
>
> (b) set out the grounds on which the applicant claims that a miscarriage of justice has occurred.

[21] The application must be determined by one judge of the Court of Appeal on the papers without an oral hearing (s15). Under s15(4), the judge must grant leave for a re-hearing if satisfied that:

> (a) a failure of the sort described in any of paragraphs (a), (b), or (c) of section 13(1) occurred in relation to the original appeal or application; and
>
> (b) there is an arguable case that a miscarriage of justice has occurred.

[22] Where leave is granted, the procedure for re-hearing is provided for in s16:

> **16. Re-hearing of appeals and applications**
>
> (1) The Court of Appeal may rehear any appeal, or application for leave to appeal, for which leave has been granted under section 15.
>
> (2) The re-hearing of an appeal or application for leave to appeal must be conducted as if it were an original appeal or application, and Part XIII of the principal Act and the rules of Court apply accordingly.

By s16(2) therefore any re-hearings are conducted under the procedures adopted in 2001 under Part I of the Amendment Act.

[23] The provisions for re-hearing (ss14-16) were not in Part II of the Bill as introduced. It contained only the validation provision. The re-hearing provisions were adopted following a recommendation of the Government Administration Select Committee, which expressed some unease about accepting assurances that no miscarriage of justice was likely to have resulted from the Court's former practice. The Committee report described the re-hearing proposal as "an additional safeguard". It did not recommend an automatic re-hearing because "conscious of the number of potentially unmeritorious applications that may result". Accordingly, it recommended that applicants show an arguable case for miscarriage of justice and imposed a time limit for applying for re-hearing.

The decision of the Privy Council in *Taito*

[24] The Privy Council in *Taito* held that the dismissal of criminal appeals according to the former practices of the Court was of "no force and effect" (paragraph 14). The "*ex parte*" decisions did not comply with the statutory regime. The Crimes Act "contemplated an oral hearing". But the Privy Council held the Court of Appeal procedures to be invalid on wider grounds than non-compliance with Part XIII of the Crimes Act 1961, non-compliance with the rules of Court, and the absence of reasons. They are the only failures in process which had been

anticipated and which are validated by s13 of the Crimes (Criminal Appeals) Amendment Act 2001.

[25] As applied to the circumstances of Mr Smith, the additional deficiencies identified in the judgment of the Privy Council in *Taito* may be summarised as follows:

- the decision to decline legal aid had "no legal validity whatever" (*Taito* paragraph 15): it was taken in a manner not authorised by and was inconsistent with the Legal Services Act 1991; the procedure undermined the statutory right of review; no reasons were given. [In the case of Mr Smith there is an additional argument that the legal aid recommendation was made by a judge of the High Court authorised to sit on the divisional Court under the Judicature Act, but who was not a "Judge of the Court of Appeal" as was required by the Legal Services Act. It is not necessary, given the other flaws, to determine this argument].

- without legal representation or the right to be present, and without the material before the Judges, Mr Smith was denied an effective appeal and the observance of the principles of natural justice, in breach of ss25(h) and 27 of the New Zealand Bill of Rights Act (*Taito* paragraphs 16, 20). [It may be noted that although in his notice of appeal Mr Smith did not seek to be present at the appeal, the opportunity to be present was not revisited when his application for legal aid was declined, as natural justice required].

- the decisions declining legal aid and dismissing the appeal were not taken by Courts properly constituted under the Judicature Act 1908 or exercising judgment in accordance with its terms (*Taito* paragraph 18).

- the *ex parte* decision dismissing the appeal was invalid, not only because it was taken without an oral hearing (in breach of Part XIII of the Crimes Act 1961), but also because:

(i) the participation of a judge who had already concluded that legal aid should not be granted "would have suggested to a fair-minded and informed observer that the judge was not independent", in breach alike of fundamental principles of the common law and ss25(a) and 27 of the New Zealand Bill of Rights Act (*Taito* paragraph 14);

(ii) the other two judges sitting had no knowledge of the case and their role was "purely formalistic or mechanical . . . involving no exercise of judicial judgment" (*Taito* paragraph 14), in breach of s59 of the Judicature Act, s25(a) of the New Zealand Bill of Rights Act 1990 and the principles of natural justice.

- overall, the system was discriminatory and arbitrary and failed the basic test of procedural due process without observance of which it cannot be concluded that appeals are unmeritorious (*Taito* paragraph 19).

- the procedures were "contrary to fundamental conceptions of fairness and justice" because they discriminated between those who were legally represented and those who were not in the provision of transcripts, cases on appeal, and oral hearings. Poor appellants were deprived of the opportunity to perfect the grounds of appeal and the ability to exercise effectively their rights to appeal. In the result, the system operated arbitrarily. The dismissal of the appeals did not take place in accordance with law (*Taito* paragraph 20).

[26] In *Taito* at para21 the Privy Council rejected an argument that the appeals should be dismissed because the appellants had failed to demonstrate an arguable miscarriage of justice:

> Given that the appellants had statutory rights to appeal without leave, and that their appeals were dismissed pursuant to a fundamentally flawed and unlawful system, this argument must be rejected.

The appeals were remitted to the Court of Appeal "for hearing" (*Taito* paragraph 25). The Solicitor-General had advised the Privy Council that, in the event of such outcome, the appellants would receive legal aid under the new system.

[27] The decision dismissing the Smith appeal on the merits is, in application of *Taito*, fundamentally flawed. The fatal defects are not confined to the qualifying errors identified in s13 of the 2001 Amendment Act. As a result, the *ex parte* determination of Mr Smith's appeals is not validated by s13. The errors exceed invalidity "by reason only" of failure to comply with Part XIII of the Crimes Act or the Rules of Court and failure to give reasons for the determination. The 1996 decision is invalid. How is it to be corrected?

Inherent power to re-open a decision

[28] The Court of Appeal has jurisdiction conferred by statute. It does not include any statutory power to rehear appeals it has finally disposed of by judgment, at least once the judgment has been perfected by entry on the Criminal Register of the Court (*R v Nakhla (No 2)* [1974] 1 NZLR 453). The Court does however have implied or inherent power to regulate its procedure and practice. Such power enables the Court to correct slips or omissions in a judgment or order which do not affect its substance. But the inherent or implied powers go further than the correction of evident slips.

[29] Thus in *R v Nakhla* the Court of Appeal accepted as correct a submission that it had inherent jurisdiction to set aside its own order if it could properly be described as a "nullity". The authority relied upon was *Craig v Kanseen* [1943] KB 256 where Lord Green MR at 262 said, in a statement subsequently approved by the Privy Council in *Kofi Forfie v Seifah* [1958] AC 59 at 67:

> Those cases appear to me to establish that a person who is affected by an order which can properly be described as a nullity is entitled ex debito justitiae to have set aside. So far as procedure is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order, and that it is not necessary to appeal from it.

[30] In *Craig v Kanssen* judgment was entered against a party who had not been served. Such deficiency in procedure was held to go beyond mere irregularity:

> In my opinion, it is beyond question that failure to serve process where service of process is required goes to the root of our conceptions of the proper procedure in litigation. Apart from proper

> *ex parte* proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it has never been adopted in this country. It cannot be maintained that an order which has been made in those circumstances is to be treated as a mere irregularity and not as something which is affected by a fundamental vice. . . . That order is a nullity, and it must be set aside. [at p262-3]

In *Kofi Forfir v Seifah*, the Privy Council held that, even without the power conferred by an ordinance to review judgments, the Judge could have set aside a judgment delivered without jurisdiction in the exercise of the inherent jurisdiction.

[31] In both Australia and England, there have been varying approaches to use of the inherent or implied jurisdiction. In *R v Cross (Patrick)* [1973] 2 All ER 920 it was held that the inherent jurisdiction is able to be exercised only before entry of judgment on the record of the court. That approach was modified by *R v Daniel* [1977] 1 All ER 620 where it was held that the limitation does not apply where a decision is a nullity, in that case because of denial of the right to be represented by counsel. In Australia it was held by the High Court in *Bailey v Marinoff* (1971) 125 CLR 529, with Gibbs J dissenting, that it would not promote the administration of justice for a court to reinstate a proceeding finally disposed of by perfection of order. The topic has recently been re-visited in both jurisdictions.

[32] In *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 the jurisdiction of the House of Lords to rescind or vary an earlier order was conceded where the earlier decision was made following procedural unfairness. Lord Browne-Wilkinson at p132 considered that the concession was properly made in respect of an ultimate court of appeal:

> In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Broome v Cassell & Co Ltd (No 2)* [1972] A.C. 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.
>
> However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or

> she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.

[33] The approach adopted in respect of a final appellate court in *Pinochet* was not thought to be applicable to an intermediate court of appeal by the majority in the High Court of Australia in *DJL v Central Authority DJL v Central Authority* (2000) 170 ALR 659. They followed the earlier decision in *Bailey v Marinoff* in holding that the Family Court did not have power to re-open a final order after entry of the formal order of the court in the record. Kirby J dissented. While he accepted that the remedy of appeal was highly relevant, he considered that the inherent power was nevertheless available in exceptional circumstances in order to maintain the integrity of the court processes:

> [92] Where a court is subject to appellate or other judicial review, it will often be possible within the judicial hierarchy, an error being shown, to obtain correction of a perfected order and the substitution of an order unaffected by the error brought to light. Apart from this, other means have been developed to afford exceptional relief from the affront to justice which would be done by the enforcement of a perfected order where this is in some way tainted by manifest error combined with demonstrable injustice.
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> . . .
>
> [94] In addition to these methods [slip correction] of overcoming the mistakes and injustices that can sometimes arise in perfected orders, the law has devised means of permitting collateral attack on such orders. This can be mounted in separate proceedings where it is alleged that the judgment was obtained through fraud. But it can also arise where it can be shown that there has been a serious denial of procedural fairness. Such remedies are necessary to maintain the integrity of the court process.

[34] Kirby J expressed the view that the exceptional power to reopen cases was part of the implied powers of appellate courts which were not final courts of appeal, to enable them to correct injustice. He was influenced by the small number of cases able to be heard by the High Court of Australia, which made the theoretical remedy of appeal to it substantially illusory. In those circumstances, to insist that there was a remedy in appeal would be "to allow form once again to triumph over substance".

[35] The English Court of Appeal in *Taylor v Lawrence* [2002] 2 All ER 353 has recently had occasion to consider the law as to when it may reopen an appeal already determined by it. In a comprehensive review, Lord Woolf CJ for the Court affirmed that the Court of Appeal had a residual jurisdiction in exceptional circumstances to reopen an appeal already determined in order to avoid injustice. Such power is derived from the court's necessary implicit powers to suppress abuses of its process and control its own practice. The Court of Appeal adopted the approach of Lord Diplock in *Bremer Vulcan Schiffbau und Maschinenfabrik v South India Shipping Corp* [1981] AC 909 at 977 that any court must have inherent power to do what is necessary "in order to maintain its character as a court of justice". The interests of finality are important and must be taken into account in considering whether to invoke the exceptional jurisdiction. But public confidence in the administration of justice made it imperative to reopen a case where presumptive bias was established, a significant injustice had resulted, and there was no effective alternative remedy. The Court of Appeal was concerned, as was Kirby J in *DJL v Central Authority*, with the opportunity for effective remedy through further appeal. A theoretical opportunity was not sufficient:

> [54] Earlier judgments referring to limits on the jurisdiction of this court must be read subject to this qualification [the inherent power to enable it to act effectively within its jurisdiction and to suppress abuse of process]. It is very easy to confuse questions as to what is the jurisdiction of a court and how that jurisdiction should be exercised. The residual jurisdiction which we are satisfied is vested in a court of appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised. There is a tension between a court having a residual jurisdiction of the type to which we are here referring and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also create injustice. There therefore needs to be a procedure which will ensure that proceedings will only be reopened when there is a real requirement for this to happen.
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> [55] One situation where this can occur is a situation where it is alleged, as here, that a decision is invalid because the court which made it was biased. If bias is established, there has been a breach of natural justice. The need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings

> which it has already heard and determined what will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations. Where the alternative remedy would be an appeal to the House of Lords this court will only give permission to reopen an appeal which it has already determined if it is satisfied that an appeal from this court is one for which the House of Lords would not give leave.
>
> [57] In due course the Civil Procedure Rules Committee may wish to consider whether rules or a practice direction setting out the procedure should be introduced.

[36] The reasoning of Lord Woolf CJ and Kirby J applies with equal force to the judgments of this Court. The Court has inherent power to revisit its decisions in exceptional circumstances when required by the interests of justice. Such power is part of the implied powers necessary for the Court to "maintain its character as a court of justice". Recourse to the power to reopen must not undermine the general principle of finality. It is available only where a substantial miscarriage of justice would result if fundamental error in procedure is not corrected and where there is no alternative effective remedy reasonably available. Without such response, public confidence in the administration of justice would be undermined.

[37] There may be cases where it is a close call whether recourse to the exceptional power is appropriate. This is not such a case. The system applied by the Court was held by the Privy Council to be "contrary to fundamental conceptions of fairness and justice". The errors included presumptive bias, breach of natural justice, and unlawful procedure. As a result, an appeal by right was denied. Justice miscarried because the failure to observe procedural due process meant that no decision that the appeals were unmeritorious could properly have been reached.

[38] There is no further appeal as of right. While there is a theoretical opportunity for further appeal through petition for special leave to appeal to the Privy Council, the availability of the appeal is uncertain and expensive. The point has been emphatically resolved already in *Taito*. It would be unfair alike to those appellants affected and to the Privy Council to require all to seek correction of acknowledged error through petition for special leave.

[39] Should the Court now invoke the inherent power to rehear the respondent's appeals? There are two impediments. The first is the Crown contentions that the inherent power is displaced by s14 of the Crimes (Criminal Appeals) Amendment Act and that any re-hearing must be by application under that provision. The second is the fact that no application by the respondent, either under the inherent jurisdiction or the s14 procedure, is before the Court because the respondent contends the original appeal should now simply be listed.

Arguments

[40] Mr France accepts that the Court has inherent power in exceptional circumstances to rehear the appeals on application made to it by the appellants. He acknowledges that the process has miscarried to such an extent that it would be appropriate for this exceptional power to be exercised, were it not for the legislative solution provided by the Crime Amendment Act 2001. The contention of the Crown is that the legislation now covers the field and ousts the inherent common law power. If it were not so, it is said that ss14-16 of the Amendment Act would be redundant. Parliament has addressed the problem by setting up a limited procedure for re-hearing (upon leave granted within time limits and where the appellant raises an arguable case of miscarriage of justice). Mr France acknowledges that the errors now identified are wider than those envisaged when the amending legislation was enacted and that it is possible to argue that they "are now so fundamental that the proper course is for the Court to itself direct re-hearings whenever sought by an appellant". He argues, however, that the legislative scheme should be applied:

> It is recognised that such an outcome limits the ability of the Court to respond to the Privy Council's judgment. The usual position would be that the Court would seek to redress the errors that had been pointed out; however, the Legislature determined it appropriate to provide in advance for an orderly regulation of the issue whatever the Privy Council's assessment. It is submitted the Court is required to give effect to that.

On this approach, the *ex parte* determinations could now be revisited by this Court only if an appellant applies for leave for re-hearing under s14 or if re-hearing is directed by the Privy Council on further appeal to it. If this principal submission is

not upheld, the Crown contends that, even if a re-hearing is ordered pursuant to the inherent powers of the Court without need for leave to be sought under s14, the re-hearing must take place under the new procedures for the hearing of appeals introduced in 2001, as required by s12 of the Amendment Act.

[41] For the respondent, Mr Ellis takes the high ground. He maintains that the appeal determination in 1996 is a nullity, and that the appellant is "entitled to have his 1996 appeal set down and heard, for the first time, without further delay". He submits that the re-hearing procedure introduced by the 2001 Amendment Act applies to those seeking re-hearing on the three nominated grounds only and does not apply to the appellant's much wider objection to the procedure which denied him a first hearing. It is argued that no application is required to set aside the unlawful 1996 determination. The appellants should simply be advised of the change in status of the outcome from their last communication from the Registrar, be sent their cases on appeal, and the appeals should be set down for hearing: "The Court is obliged as a matter of law under s25(b) and (h) of the Bill of Rights to take the initiative". To require appellants to take the initiative by making application is to put "administrative convenience" ahead of the Court's Bill of Rights Act obligations to promote the s25(h) right to an effective appeal. Mr Ellis recognises that it would be "highly undesirable" for the appellant and others in his position to file petitions to the Privy Council, but reserves the appellant's rights in that connection.

Approach

[42] The manner in which the matter has come before the Court is awkward. If the contention of the respondent is accepted, the appeal filed in 1996 will be treated as unheard and must be listed for hearing. If that contention is not accepted, the appellant specifically reserves the right to further consider the alternatives of petitioning the Privy Council for special leave to appeal or applying to this Court for re-hearing of the 1996 determination. Given that indication, the Court cannot treat the request that the appeal be listed as an informal application to set aside the 1996 determination and re-hear the appeal, although such approach would seem entirely sensible. On the approach adopted by the appellant, either the Court accedes to his

request to hear the original appeal or it grants the Crown's application to vacate the hearing (leaving the appellant to consider whether to apply for re-hearing or to appeal to the Privy Council).

[43] Mr Ellis frankly acknowledged at the hearing that the choice of appeal or re-hearing is likely to turn on whether a re-hearing would require application under s14 of the Amendment Act (requiring leave to be sought and an arguable case to be made out) and whether any re-hearing ordered in the Court's inherent jurisdiction would apply the new statutory procedures (with the risk of a mode of hearing determination that it be considered "on the papers"). Should the Crown application prevail, consideration of the procedure to be followed if application for rehearing is made may be thought to be premature. But a bald acceptance of the Crown's application, leaving open consideration of the approach to be taken on further application to the Court, would not be helpful.

[44] Mr Ellis makes the point that constitutional law is not a game of hide and seek. Neither is it a game of cat and mouse. Fundamental error in approach has been identified here. The Court must make effective response. Confronting and addressing what has happened is of the greatest importance not only for the appellants directly affected, but for the maintenance of confidence in the legal system more generally. Progress will not be made in clearing up this exceptional state of affairs without an indication of how the 2001 legislation applies to any re-hearing of the appeals. For that reason, we think it appropriate to deal with the arguments raised by the Crown.

[45] It is first necessary to deal with the respondent's primary contention that the appeals have never been heard and can simply be set down for hearing. That turns on the status of determinations acknowledged to be seriously deficient in procedure.

Status of the 1996 determination

[46] Unless a judgment of a court is set aside on further appeal or otherwise set aside or amended according to law, it is conclusive as to the legal consequences it decides. If it were not so, the principle of legality would be undermined. The

record of the Court of Appeal dismissing the appellant's appeal is accordingly conclusive as to disposition of the appeal until set aside or amended. The suggestions that the determination can be ignored without being formally set aside and that the appeal can be heard despite the record of its dismissal are contrary to principle.

[47] Thus, in *Kofi Forfir v Seifah*, the Privy Council rejected the "curious" argument that the court had power to correct only judgments made with jurisdiction and that it lacked power to set aside and rehear a judgment made without jurisdiction, which was a "nullity":

> To say that a judgment is a nullity is not to say that the judgment is not a judgment for any purpose, and, in particular, that it is not a judgment within the meaning of the term in Ord. 41 [at 66]

[48] The need for finality is based upon the policies identified by Lord Wilberforce in *The Ampthill Peerage* [1977] AC 547 at 569 as "the interests of peace, certainty and security":

> For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved.

Lord Simon of Glaisdale at 576 made the same point:

> But the fundamental principle that it is in society's interest that there should be some end to litigation is seen most characteristically in the recognition by our law – by every system of law – of the finality of a judgment. If the judgment has been obtained by fraud or collusion it is considered as a nullity and the law provides machinery whereby its nullity can be so established. If the judgment has been obtained in consequence of some procedural irregularity, it may sometimes be set aside. But such exceptional cases apart, the judgment must be allowed to conclude the matter.

[49] As both judgments make clear, the safeguards for fallibility in judgment require the use of the machinery provided by law: appeal or application to set aside

the judgment which must be on grounds strictly made out even where a decision can be characterised as a "nullity". Such defeasibility is an exception to the policy of finality and certainty. It is not self-achieving. It must be formally accomplished by a court with the power to set aside or amend. That is the approach adopted in the cases cited above at paragraphs [47] to [48] where the inherent power to revisit an invalid determination has been exercised.

[50] In the present case, the Crown application to vacate the hearing of the appeal must succeed. The appeal has been determined. It can be heard again only if the 1996 decision of the Court of Appeal is set aside according to law and a re-hearing ordered.

Is the inherent power ousted by the statutory system?

[51] Mr France submits that the statutory scheme of re-hearing excludes the inherent power of the Court to revisit an appeal. That result, he argues, follows from the requirement that an applicant for leave to obtain a statutory re-hearing must show an arguable case of miscarriage of justice, whereas the inherent power "would be exercised on the basis that the procedural flaws were enough in themselves". It is acknowledged that the scope of procedural error "was more fundamental than originally perceived by Parliament" and that "in normal terms it would be difficult to contest that the errors identified in *Taito* do not amount to a 'miscarriage'". But the Crown nevertheless maintains that under the statutory re-hearing provisions an applicant must show "an arguable case of miscarriage in the outcome as opposed to the process by which the outcome was arrived at". It is accepted by the Crown that the criticisms of the Privy Council now make it arguable that the defects are so fundamental that the Court could not but be satisfied that "there is an arguable case that a miscarriage of justice has occurred". It is acknowledged that the proper course for the Court may well be to direct re-hearing whenever one is sought by an appellant under s 14 and to direct oral argument. But Mr France submits that it is fatal to the availability of the inherent power that recourse to it would make ss14, 15 and 16 of the Amendment Act redundant.

[52] The question is one of statutory interpretation. Does Part II of the 2001 Amendment Act exclude the inherent power of the Court to revisit a determination in exceptional circumstances?

[53] The meaning of a statute must be discovered from its text and in the light of its purpose (s5(1) of the Interpretation Act 1999). Help in ascertaining the meaning of an enactment may be obtained from its headings and the Act's organisation and format (s5(3) of the Interpretation Act). A meaning consistent with the rights and freedoms contained in the New Zealand Bill of Rights Act is to be preferred (s6 of the New Zealand Bill of Rights Act). In cases of difficulty, the legislative history may throw some light (see JF Burrows, *Statute Law in New Zealand* 2nd ed (1999) at 164ff).

[54] The terms of Part II of the Amendment Act do not purport to exclude other remedy. So, counsel for the Crown acknowledge that s13 does not prevent the appellant and those in a similar position from petitioning the Privy Council for special leave to appeal. The same acceptance is to be found in the report of the Select Committee which considered the Bill (referred to in paragraph [56] below). Similarly, the text of Part II does not suggest that the re-hearing provided for by s14 excludes the inherent power of the Court to correct wider error. Application under s14 provides opportunity to correct identified procedural errors which may have given rise to a miscarriage of justice. Section 13 does not purport to validate determinations which are flawed other than on the three grounds identified. The re-hearing opportunity provided by s14 arises directly out of the same errors. The language of limited validation ("by reason only") preserves challenge on other grounds. There is nothing in the language used to suggest that errors outside the scope identified can be addressed only by the procedure in s14.

[55] The heading to Part II and its structure indicate that it is concerned to validate determinations which may be invalid through the three deficiencies specified and to provide a mechanism for ensuring no miscarriage of justice results by reason of the validation. Both the heading and the structure are consistent with s14 providing an opportunity to obtain reconsideration, on limited grounds, of appeals which by operation of s13 have been validly determined. Parliament has provided a special

statutory power to correct any possible miscarriages of justice arising out of the validation.

[56] The legislative history supports this interpretation. Section 14 was introduced during the Select Committee stage of the Bill. It was clearly consequential upon the validation contained in s13. The report of the Government Administration Select Committee of the House, which recommended the inclusion of s14, indicates that it was thought to be unlikely that the procedures used by the Court of Appeal had "of themselves" resulted in a miscarriage of justice or prejudice. But it recommended a cautious approach, just in case. The Committee also assumed that the ability to appeal errors outside those validated would not be affected:

> We note clause 10 [now s13] has been specifically worded to ensure individuals retain their right to appeal to either the Governor-General [in the exercise of the prerogative of mercy specifically preserved by s13(3)] or the Privy council on substantive issues of fact and law. The clause provides that no determination is invalid 'only' because of failures to comply with procedural matters. Clause 10 will not affect the rights of appellants to appeal where, for example, fresh evidence comes to light or where a mistake of law has been made at trial.
>
> Notwithstanding this, we are not comfortable with the assertion from the Ministry of Justice and the Solicitor-General that it is unlikely the procedures employed by the Court of Appeal, during this time, have of themselves resulted in a miscarriage of justice, or have otherwise resulted in prejudice to individual appellants. While this might be so, there is no way of knowing unless each case is reconsidered. [Report of the Government Administration Select Committee on the Crimes (Criminal Appeals) Amendment Bill (21 Feb 2001) 11]

The "procedural matters" which s13 saves (and which were thought to be unlikely to give rise to any miscarriage of justice) are those matters specifically identified.

[57] The purpose to be discerned from the Amendment Act does not suggest that it excludes re-hearing except under s14 in all cases of wider error. The deficiencies addressed in Part II are essentially want of authority by the Court for the procedure followed. They are formal defects, in the sense that they arise only through lack of specific statutory power. Determinations without such express power do not inevitably give rise to miscarriages of justice. Parliament may remedy the omission at any time without affecting fundamental principle. If it chooses to do so, no

necessary miscarriage of justice arises through rectification of the omission. In such circumstances the "additional safeguard" of a re-hearing with leave only if an arguable miscarriage of justice is shown does not breach the rights to the observance of natural justice.

[58] The deficiencies in the present case are quite different. Failure to hear, consideration by the Court of material not disclosed to the appellants, presumptive bias on the part of participating judges, discrimination in treatment between appellants, and other deficiencies identified by the Privy Council are breaches of the right to justice contained in s27(1) of the New Zealand Bill of Rights Act. They are not mere irregularities. They are breaches of an irreducible minimum standard of justice. In *Ridge v Baldwin* [1964] AC 40 at 132, Lord Hodson identified three aspects of natural justice which "stand out": the right to be heard by an unbiased tribunal, the right to have notice of the matters considered by the tribunal, and the right to be heard. All three "stand out" rights were compromised by the procedures applied here. The appellant was effectively denied his appeal, in breach of the "minimum standards of criminal procedure" provided by s25(h) of the New Zealand Bill of Rights Act.

[59] The Crown contention as to the interpretation of Part II of the Amendment Act is that re-hearing is available only by leave, on demonstration of an arguable case of miscarriage of justice in the sense that the appeal on the merits is shown to have a prospect of success. That is not an adequate response to meet the failure to provide a procedure which complies with the rights contained in ss25(h) and 27(1). Such failure requires the determinations earlier reached to be set aside "*ex debito jusititiae*" (*Craig v Kanssen* at 262 per Lord Green MR) and for the appeals to be properly considered, with no qualifying hurdle to be overcome. That result can be achieved in application of the inherent jurisdiction. The power (as its description as "inherent" or "implied" suggests) is a necessary incident of a court if it is "to maintain its character as a court of justice" (per Lord Diplock in *Bremer Vulcan Schiffbau und Maschinenfabrik v South India Shipping Corp* at 977; *Taylor v Lawrence*). An inherent power may be exercised in respect of matters regulated by statute, if its exercise does not contravene any statutory provision (*R v Moke and Lawrence* [1996] 1 NZLR 263).

[60] The Amendment Act can be given a meaning consistent with the retention of the power of the Court to correct such fundamental error in process. Interpretation of Part II in a manner which does not exclude the inherent power is therefore to be preferred, in application of s6 of the New Zealand Bill of Rights Act.

[61] It is worth recalling why the observance of natural justice is fundamental. The reasons are those expressed by Megarry J in *John v Rees* [1970] 1 Ch 345 at 402:

> It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious", they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.

[62] Lord Steyn in delivering the judgment of the Privy Council in *Taito* made the same point: "what is or is not an arguable case can only be determined after the observance of due process in considering the merits or demerits of the appeal" (paragraph 13):

> . . .the procedural rights of appellants under the legislation served an instrumental role in the sense of helping to ensure correct decisions on the substance of cases: Craig, *Administrative Law*, 4th ed, 1999, 402. Decisions that the appeals were in truth unmeritorious could only be made after observance of procedural due process. [paragraph 19]

[63] It is not clear that the Crown is correct in submitting that ss14-16 of the Crimes (Criminal Appeals) Amendment Act are redundant if the Court is able to exercise an inherent power to rehear. The circumstances of the appeals vary, as the discussion in *Taito* makes clear. If it is the case, however, that all appeals heard

between 1991 and 2001 are subject to deficiencies in procedure which are wider than the qualifying grounds identified in s13, then this may be a rare example of legislation which has proceeded under error (see *Ayrshire Employers Mutual Association Ltd v Commissioners of Inland Revenue* (1946) 27 TC 331 at 347 per Lord Macmillan). Indeed counsel for the Crown acknowledged at the hearing that the fundamental breaches of natural justice identified in the Privy Council judgment were never thought of. That much appears from the legislative history already referred to.

[64] The enactment of Part II of the Crimes (Criminal Appeals) Amendment Act does not remove the inherent power of the Court to revisit its earlier determination. On application by the appellant the interests of justice would require the Court to exercise the power to rehear the appeal.

Procedure on re-hearing

[65] The transitional provisions contained in Part I of the Crimes (Criminal Appeals) Amendment Act apply the new procedures introduced by amendment to the Crimes Act to all appeals not already set down for oral hearing at the commencement of the Amendment Act. Therefore any rehearing of an appeal by Mr Smith or others whose appeal was similarly dismissed *ex parte* after 1991 must be dealt with in accordance with those new procedures. No presumption against retrospective effect applies to such procedural reform. The new provisions make oral hearing the preferred method. Had the present matter come before the Court on an application for re-hearing, it would have been sensible for the Court to make a decision on the mode of hearing under s392A on granting the application. Mr France accepts that the appellant should be granted an oral hearing, should he make application for re-hearing. That approach is appropriate given the history of the matter, the length of delay in affording the appellant a hearing, and the view taken by the Privy Council that at the time his appeal was determined the appellant was entitled to an oral hearing. If the appellant wishes to make written application for re-hearing, the Crown's acknowledgement that the appeal should be by way of oral hearing will obviously be given full weight.

[66] In application of the new procedures, the appellant would be entitled to a preliminary case on appeal. Whether he is entitled to legal aid will be a matter for the determination of the Legal Services Board. Under s117(3) of the Legal Services Act 2000, transitional provisions require consideration of legal aid to be in accordance with the new Act.

Procedure for other appellants similarly affected

[67] Mr Ellis invites the Court to be "proactive" towards the appellants affected by the procedural deficiencies identified in *Taito*. He suggests that the Court is obliged to take the initiative to give effect to the rights of the appellants under s25(b) and (h) of the New Zealand Bill of Rights Act. Too much time has elapsed. The Court is urged to set up a process under which all appellants whose appeals were determined *ex parte* after 1991 would be sent cases on appeal with all relevant documents and a system adopted for hearing the appeals. Requiring the appellants themselves to initiate a re-hearing would, Mr Ellis submits, be to allow administrative convenience to overcome effective response to rights.

[68] Once it is decided, as we would decide (see paragraphs [46]-[50] above), that the determinations need to be formally set aside, a request for that step to be taken is needed. A letter seeking re-hearing is all that is necessary in the circumstances. But the Court cannot itself initiate re-hearings of the appeals. As the approach adopted by Mr Ellis on behalf of the respondent indicates, some appellants may prefer to consider the option of seeking leave to appeal to the Privy Council. Others may not be interested in reopening the determinations. As the discussion in *Taito* and as the circumstances of the present case illustrate, there were variations in the manner in which *ex parte* appeals were considered. Although it seems on the information available that it is unlikely, it is possible that some appeals may be within the validation provisions of s13.

[69] The failure in procedure now accepted is unprecedented. What has happened needs to be confronted and set right. The Court must accept responsibility to do what it reasonably can in contacting those affected to advise them of their right to seek re-hearing. The Legal Services Board indicated to the

Court that it too would take reasonable steps to contact those affected to advise them that the earlier adverse determinations of legal aid may have been invalid, and to invite further applications for legal aid from appellants wishing to seek a re-hearing.

[70] In *Taylor v Lawrence* the English Court of Appeal proposed a procedure for consideration of the inherent power to order a re-hearing:

> [56] . . . Accordingly a party seeking to reopen a decision of this court, whether refusing permission to appeal or dismissing a substantive appeal, must apply in writing for permission to do so. The application will then be considered on paper and only allowed to proceed if after the paper application is considered this court so directs. Unless the court so directs, there will be no right to an oral hearing of the application. The court should exercise strong control over any such application, so as to protect those who are entitled reasonably to believe that the litigation is already at an end.
>
> [57] In due course the Civil Procedure Rules Committee may wish to consider whether rules or a practice direction setting out the procedure should be introduced.

[71] The Court in *Taylor v Lawrence* was not dealing with anything comparable to the present systemic failure identified by the Privy Council. Nor was it dealing with human rights in respect of criminal process. It has to be accepted that appellants denied effective appeal and the observance of natural justice in the manner here exposed should not have to overcome any hurdles in securing re-hearing. In these exceptional circumstances, any appellant whose appeal was determined under the *ex parte* procedures is entitled to a re-hearing on letter requesting it. The procedures under the Crimes (Criminal Appeals) Amendment Act would then apply. It is unlikely to be appropriate, except at the option of the appellant, to depart from the usual requirement of oral hearing given the seriousness of the deficiencies in process and the delay in recognising the errors. Although the determination of legal aid is a matter for the Legal Services Board, the history of the matter must be relevant to that determination.

[72] We do not have authority to direct the Registrar of the Court or the Legal Services Boards in matters of administration. We endorse however the responsible suggestions by counsel for the Crown and the Legal Services Board that a system for contacting all appellants affected should be instituted. It may be that a system for

more effective response through the adoption of rules or by legislative enactment may be preferable to an administrative solution. Nothing said here is intended to inhibit that course.

Conclusion

[73] The formal outcome of the present application is that the provisional fixture for hearing the respondent's appeal must be vacated. It should not however disguise the fact that the respondent's arguments have been substantially upheld. The Court has inherent power, not removed by the validation provisions of the Crimes (Criminal Appeals) Act 2001, to set aside the determinations of appeals flawed by the serious errors in breach of natural justice identified by *Taito*. That power is appropriately invoked to rehear the appeals of those affected. Some request for re-hearing needs to be received by the Court. Information as to the ability to seek re-hearing and to request legal aid needs to be given to the appellants affected. Both the Registrar of the Court and the Legal Services Board should adopt reasonable administrative steps for that purpose.

[74] If the respondent advises the Court in writing that he seeks a re-hearing, the Registrar will be directed to set the appeal down for oral argument.

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