IN THE NIUE COURT OF APPEAL

	BETWEEN:	**IAN HIPA** Appellant
	AND	**THE CROWN** Respondent

Hearing: 25 June 2012
(Heard at Wellington)

Appearances: Mr K McCoy, for the proposed Appellant
Mr Grant Burston, for the Crown

JUDGMENT OF THE COURT OF APPEAL

Introduction

[1] The applicant seeks special leave to appeal to this Court in circumstances where he has no appeal as of right from the High Court. He faces trial in Niue on charges of arson. Coxhead J dealt with the matter at issue in a judgment dated 22 May 2012, and the intended appellant (referred to here as the applicant) filed a notice of appeal/application for special leave to appeal on the 5 June 2012.

[2] Rights of appeal to this Court are contained in the Constitution of Niue and particularly in Article 55A. It is common ground that the applicant does not fall within Article 55A(2) whereby he might have had an Appeal as of right. In those circumstances, there are two routes whereby an Appeal could find its way to this Court. The first would be the leave of the High Court, if certain criteria were met, and the other would be pursuant to paragraph 3 of Article 55A which reads:

> Notwithstanding anything in sub-clause (2) of this Article, and except where under any Act a judgment of the High Court is declared to be final, the Court of appeal may, in any case in which it thinks fit and at any time, grant special leave to appeal to that Court from any judgment of the High Court, subject to such conditions as to security for costs and otherwise as the Court of Appeal thinks fit.

Special Leave

[3] In the course of the hearing before us, both counsel agreed that there were three general questions to be considered on an application for special leave to appeal. The first, was whether the appeal raised a question of law, the second was whether the matter was a question of general importance or principle, and the third, was there was a reasonable prospect of success. The last issue has been discussed in a number of decisions which are usefully reviewed in judgments of Fisher J and Williams J.[1]

[4] The test in relation to the third question is variously described as there being a reasonable prospect of success or well arguable. Though it is described in slightly different terms, the concept is clear.

[5] The Crown rightly conceded that the first two questions must be answered in the applicant's favour.

[6] The Crown raised a preliminary point, namely that this Court ought not to grant an application for special leave when no application to the High Court for leave to appeal had been made pursuant to Article 55A(2). Certainly, in the New Zealand context, that has been a basis upon which special leave has been denied. That is a matter for the discretion of the Appellate Court and no case was referred to us that suggested that there was a bar at law to this Appellate Court hearing this appeal not withstanding that the applicant might have missed a usual step. There is a trial in Niue on this matter which is set down for the 16th of July, and it is appropriate that we deal this matter so that the applicant and the Crown know exactly where they stand now. If we do not do so, it may be many months before a trial can be rescheduled. In our view, the question of law is relatively simple and can be simply answered.

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1 *Kenyon v ACC* [2002] NZAR 385, *Mills v ACC* [2012] NZHC 1055

A reasonable prospect of success?

[7] The application as filed pleaded two grounds of appeal. The first was not pursued before us.

The second is; "*The learned Judge wrongly held that the statutory law of Niue does not provide for committal hearings, despite the terms of section 252 Niue Act 1966.*" The proposition is that a committal hearing similar to depositions in New Zealand is required before a trial in Niue. Trials for minor offences in Niue are before Justices of the Peace. Most trials for serious offences in Niue are before a Judge of the High Court sitting alone. If the offence is punishable by more than five years imprisonment, assessors are required to sit with that Judge. Section 252 of the Niue Act 1956 reads:

> *(1) When any person arrested with or without warrant under the foregoing provisions is brought before a Judge or the Registrar, the Judge or Registrar may, after such preliminary inquiry (if any), and after giving the prisoner an opportunity of being heard, by warrant either discharge the prisoner, or commit him to prison to await trial by the High Court for the offence for which he was arrested, or admit him to bail, with or without sureties, conditioned to appear before the High Court in due course for trial for the offence.*
>
> *(2) No such discharge shall amount to an acquittal so as to preclude the prosecution and trial of the accused in the High Court for the offence for which he was so arrested.*

The short point taken by the appellant is that the section contemplates a preliminary inquiry, the prisoner having the opportunity to be heard and a judge or registrar having the capacity to discharge the prisoner. We disagree, however, with that reading of the section for the following reasons.

[8] Section 252 of the Niue Act 1966 should be seen in its constitutional context. A person has been arrested, either with or without warrant and is being held by an officer of the executive. It is trite as a matter of constitutional norms that this must not continue longer than is necessary. There must be a swift reference to the judicial arm of government. In Niue, the matter is dealt with by section 251A(5) of the Niue Act 1966 which reads:

Every person who is arrested on a charge of any offence shall be brought before the High Court as soon as possible, to be dealt with according to law.

[9] Section 252 then is to be seen as answering the question, what is to happen to the prisoner when he or she is brought before the High Court.? This approach is consistent with the first word in s252 –"When".

[10] The applicant counsel has a particular view of the word "discharge" as meaning a complete discharge in the sense that the prosecution process is terminated but may be recommenced under subsection 2. In our view, that is not the case. The Judge or the Registrar has three options. He can either discharge the prisoner from arrest and into the community, commit him to prison, or admit him to bail, but in each case this is to await trial by the High Court for the offence.

[11] A dictionary definition of the world discharge in the Concise Oxford English Dictionary clarifies the situation. The first given is "*officially allow (someone) to leave somewhere, especially hospital*". The second relates to employment and has no relevance. The third reads "*release from the custody or restraints of the law*".

[12] A fair reading then indicates that the prisoner can contemplate three possibilities pre-trial being at large, being on bail, or being in prison. The Judge or Registrar may make inquiries and the prisoner is entitled to be heard.

[13] Subsection 2 simply reinforces the proposition that the discharge (discharge into the community) has no effect on the prosecution process.

[14] It is also important to see the consistency of usage within the Niue Act 1966 of the word discharge. For instance, s269 contemplates the discharge of assessors who are unable to continue. Section 281(1) contemplates conviction and discharge without sentence. Both of those uses of the word are consistent with the dictionary definition given above and militate heavily against accepting the word as used to convey a discharge from prosecution after a committal process.

[15] We will conclude by observing that there has never been a committal process in Niue. We also find it beyond contemplation that a person arrested for a very serious offence would have the possibility of being discharged by a court officer.

[16] We also note that Mr McCoy conceded that if his client was entitled to a deposition hearing, then there was no way he could be distinguished on the legislation from someone who was charged with a much more trivial offence for instance, such as using profane language, an offence whereby police bail was available under s255A.

[17] We conclude, therefore, that there is no reasonable prospect of this appeal succeeding and leave is declined.

Result

[18] At the hearing of this matter on the 25 June 2012, we held that the application for special leave was declined and that reasons would be available shortly thereafter. These are those reasons.

[19] Mr McCoy was appearing on a pro bono basis. The Crown did not seek costs.

Dated at Wellington New Zealand this 9th day of July 2012

P J Savage CJ **N F Smith J** **W W Isaac J**