CITATION:	*Siebert v Feasey* [2024] NTSC 31
PARTIES:	SIEBERT, Kelly Marie v FEASEY, Albert Bruce
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 36 of 2023 (22317071)
DELIVERED:	17 April 2024
HEARING DATE:	15 April 2024
JUDGMENT OF:	Riley AJ

CATCHWORDS:

Criminal Code Act 1983 (NT) s 188(1), s 188(2)
Local Court (Criminal Procedure) Act 1928 (NT) s 163(1), s 163(3), s 166, s 177(2)(f)
Mental Health and Related Services Act 1998 (NT) s 77, s 77(2), s 77(4)

Bryant v Kowcun [2017] NTLC 032;
Craig v State of South Australia (1995) 184 CLR 163;
Harvey v Borfilios [2017] NTSC 68;
HT v The Queen (2019) 269 CLR 403;
Lee v The Queen (1998) 195 CLR 594;
Lorenzetti v Brennan [2021] NTSCFC 3;
Mununggurr v Gordon & Anor [2011] NTSC 82;
MZAPC v Minister for Immigration and Border Protection (2021) HCA 17
O'Neill v Lockyer [2012] NTSC 10;

Re McBain; Ex P Catholic Bishops Conference [2002] 209 CLR 372;

Returned and Services League of Australia (Vic Branch) Inc v Liquor Licensing Commission (1999) 2 VR 203;

The NT Police Association Inc v The Police Arbitral Tribunal [2000] NTSC 32

REPRESENTATION:

Counsel:

Appellant:	L Auld with A Gallagher
Respondent:	T Moses with J Henderson

Solicitors:

Appellant:	Director of Public Prosecutions
Respondent:	NT Legal Aid Commission

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Siebert v Feasey [2024] NTSC 31
No. LCA 36 of 2023 (22317071)

BETWEEN:

KELLY MARIE SIEBERT
Appellant

AND:

ALBERT BRUCE FEASEY
Respondent

CORAM: RILEY AJ

REASONS FOR JUDGMENT

(Delivered 17 April 2024)

[1] This is an appeal against a decision of the Local Court made on 19 October 2023. On that day the Court, relying upon s 77(4) of the *Mental Health and Related Services Act 1998* (NT) ("the Act"), dismissed seven charges relating to offences allegedly committed by the respondent on 14 May 2023. In so doing, the Court received and relied upon a certificate from the Chief Health Officer and an associated report authored by Mental Health Nurse, Mr Mark Wilson, dated 27 July 2023 which had previously been requested by the Court under s 77(2) of the Act.

[2] The grounds of appeal are that the Local Court denied the appellant procedural fairness by: (a) refusing to allow the appellant to cross-examine

Mr Wilson unless and until the appellant obtained its own expert report addressing matters set out under s 77 of the Act; and (b) refusing the appellant's application to adjourn the matter so that the appellant could obtain an expert report to deal with relevant matters under s 77 of the Act.

The background

[3] The respondent came before the Local Court charged with a number of serious offences arising out of events which took place on 14 May 2023. In summary form the case alleged against him was that on that day he attended at an address in Stuart Park being the residence of his ex-partner SL, her partner RD and their seven children. The respondent parked his vehicle in the front driveway of the residence and commenced an argument with SL regarding money he perceived was owed to him by the father of SL. He was asked to leave multiple times. RD became aware of the conversation and approached the respondent and again asked him to leave. The respondent became increasingly angry and agitated and reached into his vehicle arming himself with a double barrel side-by-side shot gun. He stood by the open driver-side door of his vehicle and pointed the gun towards the ground and then shook it in the air telling RD "I will smash you with it". RD called out for family members to call the police and SL told the respondent to leave. The respondent then pointed the shot gun towards the house and worked the action resulting in a shell being ejected from the firearm and landing on the roof of his car. He is alleged to have said "it works I will use it on you. I will come back, I can use it". The respondent re-entered his vehicle and

reversed it onto the road. He then took the shotgun shell from the roof of the vehicle saying “I better get my bullet, I will need that”. He then drove away.

[4] The respondent was arrested on 15 May 2023 following a nine hour siege at his home. He was conveyed to Royal Darwin Hospital where he received treatment in relation to his mental health. On 31 May 2023 he was discharged into police custody.

[5] The respondent was subsequently charged with seven offences including unlawful assault, carrying a loaded firearm, possession of a firearm, and threatening behaviour.

[6] The matter first came before the Local Court on 1 June 2023 when a report was ordered pursuant to s 77 of the Act. That section is in the following terms:

> **Dismissal of charge**
>
> (1) This section applies to a person if:
>
> (a) the person is charged with an offence in proceedings before a court (other than proceedings for a committal or preliminary hearing); and
>
> (b) the charge is being dealt with summarily.
>
> (2) The court may request from the Chief Health Officer a certificate in the approved form stating:
>
> (a) whether at the time of carrying out the conduct constituting the alleged offence, the person was suffering from a mental illness or mental disturbance; and
>
> (b) if the person was suffering from a mental illness or mental disturbance – whether the mental illness or disturbance is likely to have materially contributed to the conduct.
>
> (3) The Chief Health Officer must not give the court the certificate unless the Chief Health Officer has received and considered advice

on the person from an authorised psychiatric practitioner or designated mental health practitioner.

(4) After receiving the certificate, the court must dismiss the charge if satisfied that at the time of carrying out the conduct constituting the alleged offence:

(a) the person was suffering from a mental illness or mental disturbance; and

(b) as a consequence of the mental illness or disturbance, the person:

(i) did not know the nature and quality of the conduct; or

(ii) did not know the conduct was wrong; or

(iii) was not able to control his or her actions.

[7] Section 6 of the Act defines "mental illness" for the purposes of the Act including, in s 6(3)(f), that a person is not considered to have a mental illness merely on the basis that he/she had used alcohol or other drugs.

[8] The report provided to the Local Court was dated 27 July 2023 and was over the signature of Mr Wilson who was described as a Court Clinician and a Mental Health Nurse. The report detailed the sources of information available to Mr Wilson including an interview with the respondent which took place at the Darwin Correctional Centre on 21 July 2023. It included the psychiatric history of the respondent in the period 2013 to 2023. The report noted that the respondent had been subject to fourteen Mental Health Inpatient Unit admissions to Royal Darwin Hospital in that period and that he had been supported over the years by the Top End Mental Health Service and the Forensic Mental Health Team. It was noted that the respondent had an "established diagnosis of schizophrenia" but also, separately, "the

impression that his clinical picture reflected that of a Drug Induced Psychosis (rather than schizophrenia)".

[9] The report, which was addressed to the Chief Health Officer, expressed the view that (a) pursuant to s 77(2)(a) of the Act the respondent was suffering from a mental illness at the time of the alleged offending and (b) pursuant to s 77(2)(b) his mental illness was likely to have materially contributed to his conduct. Further, it was said that it was "highly likely" he was not able to control his actions. The Chief Health Officer provided a certificate to the Court which opined that the respondent suffered from a mental illness at the time of the alleged offending which materially contributed to his alleged conduct.

[10] The report and the certificate were provided to the Local Court which was presided over by a number of different Local Court Judges on different occasions. The appellant indicated in various hearings that she wished to obtain her own advice and, further, wished to cross-examine Mr Wilson regarding his report. The immediate concern of the appellant was that, notwithstanding the respondent's history of drug induced psychosis, Mr Wilson had opined that at the time of the alleged offending the respondent was suffering from "schizophrenia" rather than some form of drug induced mental disorder. This was despite admissions made by the respondent that he had used cannabis and consumed alcohol on the morning of the alleged offences. The appellant wished to explore this issue.

[11] The appellant maintained that Mr Wilson's opinion ought to be tested under cross-examination. Of course, any further issues which may have arisen from the obtaining of a further report or from any cross-examination of Mr Wilson would also be expected to be explored and the subject of submissions.

[12] At various mentions of the matter the appellant was advised by Judges of the Local Court, in words to the effect "before the Court will permit prosecutions to cross-examine a court clinician in relation to a s 77 report, prosecution are to find an alternative opinion as the basis to that".[1] The Court was informed by the appellant on a number of occasions that efforts to obtain appropriate expert assistance were ongoing but delayed.

[13] Finally, on 19 October 2023, the then presiding Local Court Judge observed that the "prosecution has been given the opportunity to obtain alternative expert evidence in relation to the conclusion drawn by Mark Wilson and have failed to do so".[2] His Honour referred to the delays in the proceeding and then expressed the conclusion that: "I am satisfied pursuant to s 77(4) of the *Mental Health and Related Services Act* and I dismiss charges 1 through to 7 on this file". No opportunity was provided to the appellant to cross-examine Mr Wilson and the application for a further adjournment was denied. No additional reasons for decision were provided.

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1 (e.g. AB 55)

2 (AB 75)

The operation of s 77 of the Act

[14] The operation of s 77 of the Act was helpfully discussed by Barr J in *O'Neill v Lockyer*.[3] His Honour observed that the certificate issued under s 77(2) of the Act is directed to a different question from that to be decided by the Court under s 77(4)(b) of the Act. The Chief Medical Officer must state whether the mental illness or disturbance is likely to have materially contributed to the person's conduct, however, the Court must determine under s 77(4) whether, as a consequence of the mental illness or disturbance, the person (i) did not know the nature and quality of the conduct; or (ii) was not able to control his or her actions.[4] The certificate alone is not sufficient for the purpose of satisfying the Court under s 77(4)(a) and the Court should not rely exclusively upon the certificate but rather must consider all the evidence. The Court should always go behind the certificate. The purpose of the certificate is to give a preliminary indication to the Court and to the parties as to whether the defence of mental illness/mental disturbance might be available.

[15] In this case, and contrary to the observations in *O'Neill v Lockyer*, the Local Court Judge referred to the opportunity previously provided to the appellant to seek additional expert advice and then, without more, concluded: "That coupled with the fact that I am satisfied pursuant to s 77(4) of the *Mental Health and Related Services Act*, and I dismiss the charges 1 through to 7 on

3 [2012] NTSC 10 ("*O'Neill v Lockyer*")

4 See also *Mununggurr v Gordon & Anor* [2011] NTSC 82 at [16] per Kelly J.

this file". His Honour did not provide reasons for being so satisfied. Notwithstanding that failure, the appellant has not sought to appeal on that ground.

The appeal

[16] The appellant filed a notice of appeal "against the whole of the decision of the Local Court ... dismissing seven charges allegedly committed by the respondent on 14 May 2023".

[17] In response, the respondent contended that the appeal was incompetent because it was instituted by filing a single notice of appeal against the seven orders dismissing each of the seven charges. The respondent relied upon the reasoning of the Full Court in *Lorenzetti v Brennan*[5] that separate notices of appeal are required for each order dismissing a charge.

[18] In the challenge to the competence of the notice, the respondent conceded that, if the appeal was competent, the error asserted in particular (a) of the ground was made out. The respondent acknowledged that in refusing to allow the appellant to cross-examine Mr Wilson unless and until the appellant had obtained its own expert report, the Local Court denied the appellant procedural fairness. The respondent observed that, in the circumstances, to impose a condition on the right of cross-examination was an improper and unnecessary fetter on the conduct of the appellant's case. That concession was properly made.

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5 [2021] NTSCFC 3 ("*Lorenzetti*")

[19] In response to the submission that the appeal was incompetent the appellant contended that the decision in *Lorenzetti* was "plainly wrong" and presented argument in support of that claim. However, as the appellant has accepted, the decision in *Lorenzetti* is binding on this Court. If the correctness of the decision is to be challenged it will need to be referred to the Full Court for reconsideration or agitated on appeal to the Court of Appeal. Neither of those courses is suggested by either party at this stage of this particular matter.

[20] The appellant then submitted that the decision in *Lorenzetti* related to the statutory construction of s 163(1) of the *Local Court (Criminal Procedure) Act 1928* (NT) rather than s 163(3) of that Act under which the present appeal is brought. It was submitted that the two subsections "having textual differences" it would be open to this Court to find that *Lorenzetti* does not have application to s 163(3) of the Act and to proceed on the basis that only one notice of appeal was required. In my opinion, a consideration of the two provisions within that one section does not reveal any relevant textual distinction and does not support any departure from the approach adopted by the Full Court in *Lorenzetti*. To do so would be to claim an artificial distinction between the provisions in order to avoid the clear approach of the Full Court to the section.

[21] Further, the appellant submitted that if a separate notice of appeal is required in relation to each "order" appealed against, only a single notice of appeal was required in the present case because the Local Court Judge

"made a single order collectively dismissing the seven charges". With respect, whilst the Local Court Judge may have said "I dismiss charges 1 through to 7 on this file", his Honour was clearly making seven separate orders dismissing each charge.

[22] Finally, in this regard, the appellant argued that even if his Honour imposed separate orders dismissing each charge, the Court engaged in a single process of "adjudication" as stipulated in s 163(3) of the Act. It was submitted that the respondent had relied upon the same defence under s 77(4) of the Act and the same evidence in support of that defence. It was, the appellant contended, a single process of adjudication. Again, it is apparent that his Honour made seven separate orders dismissing each charge and in so doing repeated the same process of adjudication on each occasion.

[23] It follows that, consistent with the approach adopted in *Lorenzetti,* the appeal as then constituted was incompetent.

Amendment to the Notice of Appeal

[24] In the event of my ruling that the appeal as then constituted was incompetent the appellant sought to amend the notice of appeal filed on 15 November 2023 so that it is taken to be an appeal against the Local Court's dismissal of count 2 alone. Count 2 is a complaint that the respondent unlawfully assaulted SL with the circumstance of aggravation that he was armed with an offensive weapon namely a side-by-side shot gun contrary to s 188(1) and s 188(2) of the *Criminal Code Act 1983* (NT).

[25] The power to amend the notice is to be found in s 166 of the *Local Court (Criminal Procedure) Act*.

[26] The application was opposed by the respondent notwithstanding it had acknowledged that the Local Court was in error. It submitted that this Court should not allow the amendment because the appeal should in any event be dismissed in the exercise of the Court's residual discretion.

[27] The respondent conceded that the proviso contained in s 177(2)(f) of the *Local Court (Criminal Procedure) Act* is not available. That subsection provides that if a court is of the opinion that a point raised in an appeal might be decided in favour of the appellant it may still dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. The respondent accepted that the irregularity referred to in relation to particular (a) of the proposed ground of appeal was such a departure from the essential requirements of the law that it went to the root of the proceedings and amounted to a substantial miscarriage of justice.

[28] In my opinion, the concession was correctly made by the respondent.

[29] However, the respondent went on to argue that this Court retains a residual discretion to dismiss a prosecution appeal against an order of dismissal if, despite error being established, the interests of justice militate in favour of that result. Reference was made to *Harvey v Borfilios*[6] where Grant CJ said:

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6 [2017] NTSC 68 at [32]

> Finally, the appeal court retains a residual discretion to dismiss a prosecution appeal if the interests of justice militate in favour of that result. It is not made explicit in the authorities whether that consideration forms part of the determination of whether there has been a substantial miscarriage of justice, or whether the residual discretion extends beyond this and stands independently of the proviso. The factors which an appellate court may take into account in the exercise of the residual discretion suggest that its exercise extends beyond the question whether there has been a substantial miscarriage of justice, but it is unnecessary to decide that question for present purposes.

[30] I agree with those observations but, similarly, do not regard it as necessary to decide the question for present purposes.

[31] The respondent went on to submit that, in this case, despite the acknowledged miscarriage of justice the overarching interests of justice militate towards dismissing the appeal.

[32] The respondent submitted that if the matter was to be remitted to the Local Court, it would inevitably be dismissed under s 77 of the Act. It was argued that the definition of a "mental illness" for the purposes of the section is sufficiently broad to allow a defence based on a mental illness (for example schizophrenia) or a substance induced mental illness. In other words the defence was available to the respondent whether he suffered from schizophrenia or a drug induced mental disturbance at the relevant time. The respondent referred to the discussion in *Bryant v Kowcun.*[7]

[33] I do not accept that the outcome in this matter is inevitable. The respondent relied upon the report of Mr Wilson whose expertise and specialised

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7 [2017] NTLC 032 at [14] to [15] ("*Bryant v Kowcun*")

knowledge enabling the expression of the expert opinion is not accepted by the appellant who wished to cross-examine him in that regard. It may be that the challenge to his relevant expertise would be successful. Further, the appellant has foreshadowed a challenge to the conclusions reached in *Bryant v Kowcun* which, of course, is not a decision binding upon this Court. In addition, as the appellant submitted, the inability to cross-examine Mr Wilson regarding the issue of whether the respondent was suffering from the effects of schizophrenia or from a drug induced mental disturbance or, indeed, any relevant condition at all at the time of the alleged offending was not able to be pursued. It may be that the conclusion of Mr Wilson may not have been accepted and the Court concluded that the respondent was not suffering from a mental illness of any kind at the relevant time. It is to be noted that, once the status of the report of Mr Wilson has been determined, and in light of any other evidence that may be available, the Local Court is still required to undertake the processes referred to by Barr J in *O'Neill v Lockyer*.

[34] The respondent also submitted that to allow the appeal would permit the Crown to raise new matters against dismissal under s 77 of the Act. It was suggested that this may prejudice the respondent by exposing him to a second attempt by the appellant to persuade the Court on different grounds against dismissal of the charges. The difficulty is that the respondent was not permitted to cross-examine Mr Wilson and was not granted the adjournment to make the identified investigations and therefore neither the

Court nor the parties were aware of what, if any, issues might arise as a result. In seeking the adjournment the appellant identified some issues with the diagnosis of schizophrenia but, of course, the further investigations and the cross-examination may have revealed other issues. The appellant was denied the opportunity to test the evidence. As the appellant pointed out, the Local Court dismissed the charges prior to any hearing taking place. The grounds had not been able to be identified. The extent to which the respondent faces any element of double jeopardy is limited by the truncated procedure adopted.

[35] In my opinion, whilst there has been delay in the proceeding, that delay has not been shown to be unexpected or exceptional given the specialised nature of the assistance sought to be obtained. Apart from the limited prospect of double jeopardy, no actual prejudice has been identified.

[36] In all the circumstances, including the very serious nature of the allegations made against the respondent, it seems to me that leave to amend the notice of appeal should be granted and I so order.

[37] I turn to consider the amended ground of appeal. It is to be noted that there is only one ground of appeal namely that the Local Court denied the appellant procedural fairness. There are two elements of that denial being the refusal to allow the appellant to cross-examine Mr Wilson unless and until the appellant obtained its own expert report and, in addition, refusing

the appellant's application to adjourn the matter so that a further report could be obtained.

Particular (a) - cross-examination

[38] Error in relation to this element has been conceded by the respondent. As the respondent has observed, the High Court has affirmed the long established common-law principle that "confrontation and the opportunity for cross examination is of central significance to the common-law adversarial system of trial".[8] Of course, there are certain exceptions and there are statutory qualifications to that observation. However, without a proper legal basis, it is contrary to the judicial process and ordinary procedure of adversarial proceedings to deny a party the opportunity to test the evidence. Such a denial may cause practical injustice and a denial of procedural fairness.[9]

[39] The apparently "informal rule" adopted in the Local Court of refusing to allow a party to cross-examine the author of a report provided pursuant to s 77 of the Act unless that party first obtains its own expert opinion is contrary to well-established principles. It amounted to a clear denial of procedural fairness. Plainly that requirement should not be followed in future cases.

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8 *Lee v The Queen* (1998) 195 CLR 594 at [32]

9 *HT v The Queen* (2019) 269 CLR 403 at [17] and [64]

[40] Notwithstanding the concession by the respondent it was argued that, in the circumstances, the appellant was not denied procedural fairness. It was submitted there was no practical injustice in this particular case and no absolute rule that procedural fairness requires leave to cross-examine. It was suggested that the appellant had "a fair opportunity to be heard" and if the appellant was denied a fair opportunity the question became whether that denial is material.

[41] In this regard the respondent submitted that the appellant was not precluded from re-agitating the position that it should be permitted to cross-examine without calling evidence. In my opinion a fair reading of the exchanges between counsel and the learned Local Court Judge clearly indicates the contrary. His Honour made it clear that, pursuant to the informal rule, cross-examination would not have been permitted in the absence of expert alternative opinion. In any event the cross-examination would have taken place in the absence of the guiding advice to be obtained from an appropriate expert.

[42] The respondent further submitted that the appellant did not take reasonable steps to call expert evidence. Whilst there were significant, and probably frustrating delays, efforts were being made to obtain appropriate expert assistance. In any event the denial of the right to cross-examine in the absence of such evidence remains a practical injustice and a denial of procedural fairness. This was not a "bare or merely technical denial of

procedural fairness"[10] but, rather, went to the core of the appellant's ability to test the case for the respondent.

[43] The respondent's submission that, in the absence of an alternative expert opinion, the cross-examination was doomed to fail cannot be sustained for the reasons I have expressed elsewhere in these reasons.

[44] In my opinion the appeal must be allowed on this ground.

Particular (b) – adjournment

[45] In light of my conclusion in relation to the first element of the ground of appeal it is unnecessary to consider in detail whether, alone, the refusal to allow the appellant's application for an adjournment to obtain an expert report amounted to a denial of procedural fairness.

[46] When the matter was before the Court on 21 September 2023 the appellant sought an eight week adjournment in order to obtain a report. Contrary to that submission an adjournment of only four weeks was allowed with the matter to come back "for mention" at which time the appellant was to confirm the retention of an expert and provide a report. At the mention on 19 October 2023 further time was sought but the learned Local Court Judge proceeded in the manner described at [13] above.

[47] A refusal to grant an adjournment can constitute a failure to provide a party to proceedings with the opportunity of adequately presenting its case. In this

10 *MZAPC v Minister for Immigration and Border Protection* (2021) HCA 17 at [46]

case I simply note that the refusal of the adjournment was part of the denial of procedural fairness. The adjournment to obtain the report which, in turn, would inform the cross-examination of Mr Wilson was an integral part of the denial of procedural fairness.

Judicial review

[48] In light of the conclusions expressed above the appellant sought to move on the Originating Motion seeking judicial review of the decision of the Local Court to dismiss the six charges which were not included in the successful appeal. In so doing it invoked the inherent supervisory jurisdiction of the Court and sought an order in the nature of *certiorari* and, if necessary, an order in mandamus requiring the Local Court to determine whether the charges against the respondent should be dismissed under s 77(4) of the Act according to law.

[49] The role of the Court in this regard has been expressed as follows:[11]

> Ultimately, at all events when what is in question is error in the course of decision-making … The task for the court from which *certiorari* is sought must be to distinguish between, on the one hand, those matters which the tribunal is given the jurisdiction to decide, and even to decide wrongly (so that error does not go to jurisdiction), and on the other hand those in respect of which, while it may have the power to enquire into them, it does not have the jurisdiction to decide wrongly (so that error does go to jurisdiction).

[50] In *Craig v State of South Australia*[12] the High Court observed:

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11 *Returned and Services League of Australia (Vic Branch) Inc v Liquor Licensing Commission* (1999) 2 VR 203 at p 210 which was cited with approval in *The NT Police Association Inc v The Police Arbitral Tribunal* [2000] NTSC 32 at [132]

> An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist. Such jurisdictional error can infect either a positive act or a refusal or failure to act. Since *certiorari* goes only to quash a decision or order, an inferior court will fall into jurisdictional error for the purposes of the writ where it makes an order or decision (including an order or decision to the effect that it lacks, or refuses to exercise, jurisdiction) which is based upon a mistaken assumption or denial of jurisdiction or misconception or disregard of the nature or limits of jurisdiction.

[51] And further:[13]

> Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and "error of law on the face of the record".

[52] In this matter the application was commenced out of time and an extension of time was sought. The appellant must establish that there are "special circumstances" justifying the extension of time. Here the delay was beyond that which I addressed earlier in these reasons. The only proffered explanation for the delay in relation to these proposed proceedings was that the appellant did not know until 13 February 2024 that the respondent might raise the ruling in *Lorenzetti* and, it was submitted, the appellant then acted promptly. With respect, the ruling in *Lorenzetti* would have application whether raised by the respondent or not. This does not justify the significant delay.

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12 (1995) 184 CLR 163 at p 177

13 supra at p 175

[53] The grant of *certiorari* lies in the discretion of the court. It is not granted as of right.[14]

[54] *Certiorari* for error of law on the face of the record is ordinarily to be refused to a party with a right of appeal against the order sought to be quashed.[15] In this matter the appellant had a right of appeal and sought to exercise that right. However, in so doing, it proceeded contrary to the statutory requirements which led to a conclusion that the appeals were incompetent. Why the appellant proceeded in that way has not been made clear.

[55] In light of the granting of the appeal in relation to count 2 any concerns regarding the failure of the Local Court to provide procedural fairness in applications of this kind have been addressed. In submissions counsel for the appellant acknowledged that the challenge to the "informal rule" was the real concern of the appellant. The appellant has been afforded the opportunity to correct that procedure and nothing will be added by granting *certiorari* in relation to the remaining counts.

[56] The delay in bringing these proceedings also tells against the granting of an extension of time.

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14 *Re McBain; Ex P Catholic Bishops Conference* [2002] 209 CLR 372 at p 415

15 ibid at p 403

[57] In my opinion, *certiorari* should not be granted in the exercise of my discretion. I have concluded that, in all the circumstances, an extension of time in which to commence proceedings should not be granted.

Conclusion

[58] I declare that the notice of appeal as lodged was incompetent. However, I allow the application to amend the notice of appeal to limit the notice to one file being that related to count 2 on the information. In relation to that appeal I allow the appeal and direct that the matter be remitted to the Local Court to be dealt with according to law. In relation to the application for judicial review I dismiss the application for an extension of time.

[59] I will hear the parties as to consequential orders and costs.

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