R v Taito [2003] 3 NZLR 577 (PC) —THE PRACTICAL USE OF THE NZBORA

Robert Lithgow's, highly critical article in the New Zealand Law Journal, which said:

The successful appeals of Taito, Bennett and ten others is an unambiguous humiliation for the Court of Appeal of New Zealand. The guts of the decision is a step by step lesson in what a criminal appeal should be and how it should be conducted. The concepts are so basic, and so irrefutable when stated succinctly, that it is hard to understand how they could have been lost sight of. The brief history is that the Court of Appeal, for many years, used its control of the grant of criminal legal aid as a tool to manage its workload.

When Good Courts Go Bad, NZLJ, 2002, pp150/1.

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Taito said:

[12] The correct approach to the right of appeal contained in s 25(h) of the Bill of Rights Act, and in s 383 of the Crimes Act, is not in doubt. It is intended to be an effective right of appeal which so far as is reasonably possible will ensure that justice is done in the appeal process. The context is one of access to justice and it calls for what Lord Wilberforce in *Minister of Home Affairs[2003] 3 NZLR 577 page 597(Bermuda) v Fisher [1980] AC 319 at p 328, described as "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism'". The substance must match the form. What is required is a collective judicial decision on the merits of the appeal by a division (three members) of the Court of Appeal, sitting together, and arrived at after a hearing in open Court: see s 25(a) of the Bill of Rights Act. So far as the Solicitor-General felt unable unreservedly to embrace these propositions his doubts are not justified. It must be the starting point of the consideration of the present appeals.*

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"Thursday December 23 1999

Keith J

Madame Registrar

…

For Decision (ex parte)

…

375/99 Lewis Desmond BOYD v The Queen

-Dismissed"

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What Taito decided

The *Taito* judgment partially reads:

Held:

1 The dismissal by the Court of Appeal of all the appeals under the ex parte procedure had been of no force or effect. The decisions had not been in accordance with the opinion of the Judges present, as required by s 59 of the Judicature Act 1908, but had **been purely formal or mechanical acts relying on the earlier decision that legal aid should not be granted and involving no exercise of judicial judgment**. The Solicitor-General had not appeared as required by s 390 of the Crimes Act 1961 and the appellant had not been given a choice of submitting written argument or appearing in person as required by s 388(1) of the Crimes Act. **The participation in the decisions to dismiss the appeals of a Judge who had taken part in the decision to decline legal aid would have suggested to a fair-minded and informed observer that the Judge was not independent**…

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What Taito decided (continued)

2 ... **There was no hearing by the three Judges, the appellant was not allowed to be present and the three Judges never met to discuss the cases under consideration. The circulation of papers between Judges without face-to-face discussion or collective decision did not satisfy minimum standards of adjudication by an appellate Court and the applications were dismissed without reasons being given** …

3 The overall process had failed to meet the requirements of natural justice. …

Appeals allowed…

[**Bold added**]

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Their Lordships further finding that the *ex parte decisions were purely formalistic or mechanical acts involving no exercise of judicial judgment*. They considered a second fundamental reason why the decisions of the three judges could not be regarded as Court of Appeal judgments was that the Crimes Act required a hearing, and there was no hearing. In response to the Solicitor-General's argument that the overall process met natural justice, their Lordships commented—*Decisions that the appeals were in truth unmeritorious could only be made after observance of procedural due process. Unfortunately, the system failed this basic test*.

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Allan Bracegirdle said:

The Privy Council had some harsh and uncompromising things to say about those practices in finding the Court's decisions dismissing the appeals to be invalid. (In the meantime, Parliament had passed the Crimes (Criminal Appeals) Amendment Act 2001 to remedy these defects, validate prior determinations except those subject to the appeal to the Privy Council, and permit certain other rehearings.

Legislative Counsel, Office of the Clerk of the House of Representatives (NZ), *Members of Parliament and Defamation: The Courts Raise the Bar*. Paper to the Annual Conference of the Australasian Study of Parliament Group on the theme of Parliamentary Privilege, Victorian Chapter of ASPG, Parliament House, Melbourne, Australia, 11 and 12 October 2002.

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Australia (Fed) – ACT and Victoria

ICCPR

Beth Simpson in an interesting analysis of theories of commitment to international treaties, argues that common law systems provide incentives for governments to go slow on the ratification process, especially in human rights areas because of the precedent system, and because of judicial independences. She suggested that local law is shielded from political negotiated arguments nor comfortable fitting with local grown law.

Mobilizing for Human Rights, International Law in Domestic Politics Cambridge University Press, 2009, Chapter 3.