**NOTE: PUBLICATION OF NAME(S) OR IDENTIFYING PARTICULARS OF COMPLAINANT(S) PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.**

**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 77/2013**
**[2013] NZSC 92**

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| BETWEEN | STEPHEN JOHN LAWLER<br>Applicant |
| AND | THE QUEEN<br>Respondent |

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| Court: | McGrath, Glazebrook and Arnold JJ |
| Counsel: | T Ellis and G K Edgeler for the Applicant<br>B Keith for the Respondent |
| Judgment: | 3 October 2013 |

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**JUDGMENT OF THE COURT**

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**The application for leave to appeal is declined.**

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**REASONS**

## Introduction

[1] Mr Lawler seeks leave to appeal against a decision of the Court of Appeal dismissing his appeal against convictions for sexual offending in 1987, 1990 and 1994 and against the imposition of a sentence of preventive detention.[1]

[2] Mr Lawler applied for a recall of the Court of Appeal's decision. That application was dismissed on 4 September 2013.[2]

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1 *Lawler v R* [2013] NZCA 308. The Court did grant leave to appeal out of time.

## Grounds of leave application

[3] The application for leave to appeal with regard to Mr Lawler's convictions is made on the basis that there had been an absence of proper and full disability reporting to the various courts that had dealt with Mr Lawler in the past. It is also based on the alleged failure of the Court of Appeal to call for more reports. It is asserted that Mr Lawler was unfit to plead at the dates on which he was convicted, being intellectually disabled with an IQ of 61.

[4] On sentence, it is asserted that preventive detention was not warranted on the material before the sentencing Court and that the sentence has not been properly administered, including that there has been a lack of opportunities for rehabilitation. Mr Ellis also points to a decision of the High Court of Australia,[3] which had not been considered by the Court of Appeal.[4]

[5] Mr Ellis on behalf of Mr Lawler, applies to add a further ground of appeal following the Court of Appeal's refusal to recall its decision. He submits that the Court of Appeal lacked independence at the appeal hearing. This is on the basis that the discretionary recognition of a currently serving judge's judicial work through the Honours system jeopardises the independence of the judiciary.[5]

## The approach of the Court of Appeal on the conviction appeal

[6] In the Court of Appeal a report was filed by a clinical psychologist, Ms Visser, on behalf of Mr Lawler. Her view was that Mr Lawler is unfit to stand trial now and would have been unfit to stand trial in 1990 had the current test been applied and also had the test in *R v L*[6] been applied.[7]

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2 *Lawler v R* [2013] NZCA 415.

3 *Yates v R* [2013] HCA 8.

4 This decision had not been referred to the Court at the time it decided the substantive appeal but was referred to the Court in the recall application.

5 Mr Ellis also asserts that a new coram should have heard the recall application. The Court, however, has no jurisdiction to hear an appeal against the Court of Appeal's refusal to recall a judgment in a criminal appeal: *de Mey v R* [2005] NZSC 27 [3]–[4]; affirmed *Blick v R* [2012] NZSC 108, [3]–[4].

6 *R v L* [1998] 2 NZLR 141 (CA).

7 *Lawler*, above n 1, at [40].

[7] Dr Duff, a consultant psychiatrist retained by the Crown, said in her evidence that a full scale IQ score of 61 would be "entirely compatible" with "potentially having the competencies necessary to be found fit to stand trial". She cautioned, however, that IQ scores cannot provide a definitive answer to the Court on the question of competency to stand trial.[8]

[8] The Court of Appeal had "real concerns" about the validity of Ms Visser's "deduction that her assessment of the appellant in 2012 can be extrapolated and provide a proper basis for a conclusion about his fitness to plead on occasions 19, 23 and 25 years ago".[9] It therefore analysed the evidence relating to Mr Lawler's mental capacity and fitness to plead from the time of Mr Lawler's convictions in 1987, 1990 and 1993.

[9] Having considered all the evidence, the Court concluded that there was no proper basis for it to intervene in the convictions. The Court said that the contemporaneous documents suggest that Mr Lawler was assessed as fit to plead at the time of his convictions and the new health assessors' reports did not persuade the Court otherwise.[10]

**The approach of the Court of Appeal on the sentence appeal**

[10] With regard to the sentence of preventive detention, the Court of Appeal noted that the sentencing judge had before him a report highlighting the risk of reoffending and Mr Lawler's record of offending indicated that that risk was real. Mr Lawler's efforts at rehabilitation had been unsuccessful.[11]

[11] The Court said that, even if (as Mr Ellis suggested) this was because Mr Lawler did not have the intellectual capacity to participate in the programmes, it did not alter the fact that he posed a real risk that justified a sentence that was

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8 *Lawler*, above n 1, at [45]. Dr Duff had been retained to review the Visser report. Her report did not constitute an assessment of Mr Lawler.

9 At [55].

10 At [65].

11 At [70].

directed at protection of the community. The Court concluded that the Judge was right to impose a sentence of preventive detention.[12]

**The recusal application in the Court of Appeal**

[12] Mr Ellis' recusal application was refused by the Court of Appeal on the basis that Mr Ellis had withdrawn his request for the panel hearing the appeal to stand aside.[13]

[13] Mr Ellis had also sought a "strong statement from the judiciary that the current system undermines their independence ... together with a statement that no Judge will accept a knighthood or damehood whilst in office".[14] The Court of Appeal refused this remedy as it had nothing to do with the conduct of a criminal trial.[15]

**Should leave be given on the recusal issue?**

[14] Mr Ellis asserts that the Court of Appeal wrongly stated that the recusal application was withdrawn. He accepts that he withdrew the submission that the "current coram was biased" but maintains that he did not withdraw his submission relating to the alleged "systemic breach of judicial independence".

[15] It is difficult to see Mr Ellis' withdrawal of objection to the coram as anything other than a withdrawal of the recusal application. The only matter left was Mr Ellis' remedy for the alleged institutional lack of independence. The Court of Appeal was clearly correct to state that this does not relate to the criminal appeal.

[16] Mr Ellis also complains about the allegedly unfair characterisation by the Court of Appeal of his submissions as a "political crusade".[16] That comment cannot provide grounds for appeal.

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12 At [70]. The Court did comment that they were of the same view as Ms Visser and Dr Duff that an assessment under s 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 would be appropriate in Mr Lawler's case but said that this had to be initiated by the manager of the prison. At [74].

13 At [79].

14 At [80].

15 At [81].

16 At [78].

[17] Mr Ellis has raised nothing which would suggest bias or apparent bias on the part of the Court which heard Mr Lawler's appeal. The application for leave to appeal on this ground is declined.

**Should leave be granted on the conviction or sentence appeals?**

[18] Turning to the proposed conviction appeals, the Court of Appeal carefully assessed the contemporary records and was not persuaded by the Visser report that the contemporary assessment of Mr Lawler as fit to plead was in error. Mr Ellis has not raised anything to suggest this assessment was erroneous. As to whether the Court should have called for further reports, Mr Ellis has not indicated what further material could or should have been made available.

[19] As to sentence, there was expert evidence at sentencing in 1994 of Mr Lawler's likelihood of further offending and his record of prior offending. Nothing has been raised to counter this evidence. The Australian High Court decision in *Yates* concerned a different statutory regime and very different facts.[17]

[20] Turning to the issues raised about the management of Mr Lawler in prison, this is irrelevant to the correctness of the sentence imposed.[18]

**Conclusion**

[21] The issues involved in the proposed appeal against his convictions and sentence relate to Mr Lawler's particular circumstances. No issue of public importance arises. Nor is there a risk of a miscarriage of justice.

[22] The application for leave to appeal is therefore declined.

Solicitors:
Crown Law Office for Respondent

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[17] In that case a preventive sentence had been imposed where there had been no evidence that could support a conclusion that Mr Yates met the relevant statutory test. See at [35].

[18] *Fergusson v R* [2013] NZSC 28 at [9]–[10]. See also *R v Exley* [2007] NZCA 393 at [22].