**NOTE: THERE IS AN EXTANT ORDER SUPPRESSING THE NAMES AND IDENTIFYING PARTICULARS OF THE APPLICANT AND HER FATHER**

**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 43/2012**
**[2015] NZSC 184**

| | |
|---|---|
| BETWEEN | A (SC 43/2012)<br>Applicant |
| AND | THE QUEEN<br>Respondent |

| | |
|---|---|
| Court: | Elias CJ, Arnold and O'Regan JJ |
| Counsel: | C Mitchell for Applicant<br>K S Grau for Respondent |
| Judgment: | 2 December 2015 |

---

**JUDGMENT OF THE COURT**

---

**The application for recall of this Court's judgment ([2012] NZSC 76) is dismissed.**

---

**REASONS**

[1] This is an application for recall of a judgment of this Court declining leave to appeal in a criminal matter.

[2] The background to the application is most conveniently described in a brief chronology:

(a) On 2 November 2010, the applicant was convicted of conspiracy to commit incest and ordered to come up for sentence within 12 months if called upon. The applicant's submission that she should be discharged without conviction was rejected by the sentencing Judge.

(b) On 19 July 2011, the applicant's appeal against conviction was dismissed by the Court of Appeal.[1]

(c) On 24 August 2012, the applicant's application for leave to appeal (which was filed some 13 months after the Court of Appeal decision) was dismissed by this Court.[2]

(d) On 16 October 2012, the applicant's application to recall this Court's judgment refusing leave was dismissed.[3]

(e) On 22 October 2015, the present application for recall was filed in this Court.

[3] The background to the case was summarised in this Court's leave judgment as follows:

> [2] The applicant pleaded guilty to a count of conspiracy to commit incest. It is accepted that no actual incest took place between the applicant and her natural father but plans to participate in sexual activity were made over a period of some months. The sentencing judge, in a fully reasoned decision in which he examined and rejected suggestions that the impact of a conviction would be disproportionate, rejected that submission that she be discharged without conviction. The applicant was convicted and ordered to come up for sentence within 12 months if called upon.
>
> [3] The applicant's appeal to the Court of Appeal was dismissed. The Court considered all matters advanced on behalf of the applicant as to the disproportionate effect of conviction. Given the permanent name suppression imposed by the judge, the Court considered that the suggestions of impact of conviction (upon the applicant's employment and immigration status and on questions of access and custody relating to her children) were to some extent speculative, although accepting there could be such adverse effects. Nevertheless, it concluded that the "seriousness of the departure from community standards involved in [the offending]" meant that the consequences of conviction were not out of proportion to the gravity of the offending. The courts should not usurp the role of the relevant registration bodies, employers and the immigration service in assessing whether the convictions properly impacted upon the applicant's standing. The Court considered that the sentencing judge had achieved a correct balance between acknowledging the

---

1 *A (CA747/2010) v R* [2011] NZCA 328 (Glazebrook, Rodney Hansen and MacKenzie JJ).
2 *A v R* [2012] NZSC 76.
3 *A v R* [2012] NZSC 84.

> seriousness of the offending and the wider community interests against the private interests of the applicant by entering convictions on the basis of name suppression.

[4] The first application for recall was made after the applicant had resigned from her job because her employer found out about her conviction. It was then argued that the Court should reconsider its earlier decision in light of the fact that this consequence of her conviction (loss of employment) had now become known, whereas the effect of a conviction on her employment prospects had not been known with such certainty when the decision refusing to grant leave had been made. This Court said this was not a ground for recall.[4] It noted that the Court of Appeal had fully considered the impact of a conviction on the applicant's employment in the future and had accepted that there could be adverse effects, but had found that these adverse effects had to be weighed against wider community interests.[5] The Court said the fact that an adverse effect may have come to pass was not therefore an unexpected consequence of the conviction, and that this meant that no ground for recall had been made out.

[5] The present application for recall is founded on the basis that since the first recall application, the applicant has made numerous attempts to obtain employment but has been unable to do so, because disclosure of a conviction for conspiracy to commit incest always leads prospective employers to consider that she is not employable. In many cases the reaction arises from a presumption that the offence committed by the applicant was a crime involving children. Of course, that is quite untrue. As was recognised in the earlier judgment, the offence arose because the applicant suffered from a psychological condition known as Genetic Sexual Attraction, a condition that arises where a parent and child have been separated from one another. In the applicant's case she was separated from her father when she was four and met him again when she was 39. Importantly, no actual incest took place.

[6] The effect of the inability to obtain employment on the applicant's mental health is outlined in a report from a registered psychologist, Lynn Berresford. Ms Berresford says that the applicant is very much at risk and experiences daily the

---

4 At [2].
5 At [2].

total hopelessness of her current situation. She says that the applicant has been diagnosed with anxiety and depression and has been provided with medication for these conditions. She expresses the view that the applicant is very much at risk if her conviction is not reversed.

[7] While we have considerable sympathy for the position the applicant finds herself in, we do not consider that the situation faced by the applicant is a ground for recall of this Court's earlier judgment[6] or a basis for reopening the case.[7] The sentencing decision, refusing to enter a discharge without conviction but imposing a sentence that reflected the Court's acceptance of the low level nature of the applicant's conduct and the fact that no active incest occurred, was made in light of the information available to the Court at the time but with the clear understanding that it could adversely affect the future employment opportunities of the applicant. The fact that it has done so does not alter that position.[8]

[8] In those circumstances we decline the application to recall this Court's judgment declining leave to appeal against the Court of Appeal's 2012 judgment.

Solicitors:
Crown Law Office, Wellington for Respondent

---

6 *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633.
7 *R v Smith* [2003] 3 NZLR 617 (CA) at [36]–[38].
8 The situation facing the applicant may provide support for an application under the Criminal Records (Clean Slate) Act 2004 when the rehabilitation period specified in that legislation has elapsed.