IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 76/2019
[2020] NZSC 62

BETWEEN	CECILIA VICTORIA UHRLE Applicant
AND	THE QUEEN Respondent

Hearing:	18 February 2020
Court:	Winkelmann CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	G N E Bradford and S D Withers for Applicant C A Brook for Respondent R S Reed QC as counsel assisting the Court
Judgment:	9 July 2020

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS
(Given by Winkelmann CJ and Ellen France J)

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Introduction

[1] In 2013 Ms Uhrle was convicted, together with three co-offenders, of murder.[1] Her appeal against conviction was dismissed by the Court of Appeal in 2015.[2] This Court declined leave to appeal from the decision of the Court of Appeal.[3]

[2] In September 2018, Ms Uhrle filed an application to "bring a 'second appeal against conviction'" in the Court of Appeal on new grounds.[4] The application was brought on the basis there was fresh evidence, namely, a statement from Ms Uhrle's husband and co-offender, Faamanu Fesuluai, in which he claims sole responsibility for the murder. Ms Uhrle's application was heard by the Court of Appeal along with two other applications to bring second appeals in unrelated cases.[5]

[3] The Court of Appeal dismissed the applications.[6] In assessing the applications, the Court said it was exercising the "inherent power" of the Court "to recall a final decision in exceptional circumstances when required by the interests of justice" as set out in *R v Smith*.[7]

[4] Ms Uhrle then made an application to this Court for leave to bring a second appeal against conviction.

[5] The Court decided to hold a hearing to determine our jurisdiction to hear the appeal.[8] The issues arising from the question as to jurisdiction are as follows:

(a) Is a direct appeal from the High Court available?

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1 In sentencing Ms Uhrle, Cooper J, the trial Judge, considered it likely that the jury found Ms Uhrle guilty under s 66(2) of the Crimes Act 1961: *R v Uhrle* [2013] NZHC 922 at [13].

2 *Uhrle v R* [2015] NZCA 412 (Winkelmann, Lang and Wylie JJ). This appeal to the Court of Appeal focused primarily on the trial Judge's directions, particularly those as to party liability.

3 *Uhrle v R* [2016] NZSC 64, (2016) 28 CRNZ 270.

4 This description is how the Court of Appeal recorded Ms Uhrle's application: *Lyon v R* [2019] NZCA 311, [2019] 3 NZLR 421 (Kós P, Brown and Williams JJ) [*Uhrle* (CA recall)] at [3].

5 Mr Lyon filed an application "to bring a second appeal" and Mr Boyes-Warren filed an application for leave "to bring a second appeal (against sentence)".

6 *Uhrle* (CA recall), above n 4.

7 At [23] citing *R v Smith* [2003] 3 NZLR 617 (CA).

8 Ms Rachael Reed QC was appointed as counsel to assist the Court at the hearing.

(b) Was the Court of Appeal correct to treat the application as an application for recall rather than as an application for leave to bring a second appeal?

(c) If the application to the Court of Appeal is an application for recall, does this Court have jurisdiction to hear an appeal from the decision declining to recall?

(d) Does this Court have jurisdiction in a criminal case to entertain a second application for leave and, if so, what is the basis for the exercise of that jurisdiction?

(e) If there is jurisdiction, should leave be granted to Ms Uhrle?

[6] We deal with each question in turn.

Is a direct appeal from the High Court available?

[7] It is common ground between the parties and counsel assisting that in this case, as Ms Uhrle has exercised her right of appeal to the Court of Appeal and to this Court, there is now no ability for this Court to hear a direct appeal from the High Court.

[8] We agree. That outcome reflects the statutory scheme both under the Supreme Court Act 2003, which applied to Ms Uhrle's appeal, and under the Senior Courts Act 2016.

[9] Under s 10 of the Supreme Court Act, the Court could, relevantly, hear and determine appeals authorised by Part 13 or s 406A of the Crimes Act 1961. Part 13 set out the procedure for appeals against conviction in indictable matters. Under s 383, a convicted person could appeal against conviction to the Court of Appeal or, with leave, to the Supreme Court. Section 383A conferred a right of appeal, with leave, to this Court against a decision of the Court of Appeal.

[10] The same approach is taken in the Senior Courts Act. Section 71 deals with appeals against decisions in criminal proceedings and provides that the Court may,

relevantly, "hear and determine appeals authorised by" Part 6 of the Criminal Procedure Act 2011. Under both the Supreme Court Act and the Senior Courts Act, "decision" means, or includes, respectively, a "judgment, decree, order, direction, or determination".[9]

[11] Under Part 6 of the Criminal Procedure Act, as the submissions for the respondent note, the language used is clear. That is, a direct appeal with leave to this Court is an alternative option, not an additional avenue to the exercise of a general right of appeal. Hence, for example, s 230(1)(c) says that the first appeal court for an appeal against conviction in category 4 or jury trial matters is "either the Court of Appeal or the Supreme Court".[10]

[12] This Court described how the equivalent provisions in the Crimes Act worked in *R v Clark* in the context of determining whether the Court could give leave to hear a second appeal from a pre-trial ruling as to the admissibility of evidence at trial.[11] Elias CJ, delivering the judgment of the Court, put the position in this way:

> [8] What is contemplated by s 383 is not two consecutive appeals but the possibility of an appeal to the Supreme Court bypassing or "leap-frogging" the Court of Appeal. That is made clear by s 383A … . Section 383A provides distinctly for a second appeal from a decision of the Court of Appeal on appeal under s 383. If the argument addressed to us on the interpretation of s 379A is correct, it would be equally valid for s 383. On that interpretation of s 383, s 383A would be wholly unnecessary.

[13] The Court added:[12]

> Whenever provision is made for a direct appeal to the Supreme Court, it is an exceptional "leap-frog" of the Court of Appeal, not a procedure to be resorted to following a Court of Appeal determination.[13]

[14] Policy considerations, particularly the interests of finality and the need to avoid uncertainty, support this approach.

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9 Supreme Court Act 2003, s 4; and Senior Courts Act 2016, s 65.

10 The same language is used for pre-trial appeals (s 219(1)(c)); sentence appeals (s 247(1)(d)); contempt appeals (s 261(c)); costs appeals (s 272(1)(c)); suppression appeals (s 284(c)); and appeals on questions of law (s 297(1)(c)).

11 *R v Clark* [2005] NZSC 23, [2005] 2 NZLR 747.

12 At [10]. *Clark* was applied in *Kanhai v R* [2005] NZSC 25 at [5].

13 The leap-frog appeal is described as "exceptional" because under s 14 of the Supreme Court Act and, now, s 75 of the Senior Courts Act, a direct appeal is available only in exceptional circumstances.

Characterisation of the application to the Court of Appeal

[15] The Court of Appeal noted that decisions of that Court had treated similar applications as, variously, applications to "revisit", "reopen" or "recall" the original appeal, or to appeal for a second time.[14] The Court took the view that if relying on the jurisdiction in *Smith*, the correct description was that the Court was recalling its judgment. In that respect, the Court considered that the words "reopen" and "revisit" "obscure what in fact is happening" where a final judgment has been given, "which is not a nullity".[15]

[16] The parties take no issue with the characterisation that the Court of Appeal was exercising its power to recall. Both essentially accept this is the effect of the fact the Court of Appeal's jurisdiction is statutory. Counsel assisting the Court suggests the application to the Court of Appeal would be better described as a narrow one of reopening, rather than recall. This seems to reflect a concern about appeal rights from the decision to recall.

[17] We consider the Court of Appeal was correct to treat the application as one for recall for the reason it gave. We agree other descriptions such as revisit or reopen do not accurately describe what the Court is doing. We expand upon this in our discussion below on the scope of the recall jurisdiction in criminal cases. The concern about the effect on appeal rights can be addressed in that context.

Is there jurisdiction for this Court to hear an appeal from a decision declining recall?

[18] There was no real contest about this question either and it can be dealt with shortly. The issue was considered by this Court in *de Mey v R*.[16] In concluding there was no jurisdiction to hear an appeal against a decision of the Court of Appeal declining to recall, the Court said this:

> [4] A decision "on appeal under section 383" means the decision in which the Court of Appeal determines the appeal under s 383, in this case by

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14 *Uhrle* (CA recall), above n 4, at [2], citing as examples *R (CA89/2018) v R* [2019] NZCA 176 ("reopen"); *Jones v R* [2019] NZCA 66 ("revisit"); *Banks v R* [2015] NZCA 182 ("recall"); and *Michaels v R* [2017] NZCA 254 ("for a second time").

15 At [25].

16 *de Mey v R* [2005] NZSC 27.

> dismissing the conviction appeal. By contrast, a decision of the Court of Appeal refusing to reopen its appeal decision is not a decision of that character. It is no more than a decision that the Court of Appeal will not re-consider its decision on appeal. It can be described as a preliminary decision which, if it had been made in favour of the applicant, would have led to another decision on appeal, namely either a decision confirming the original decision to dismiss the appeal or a decision to allow the appeal.[17]

[19] We agree. As counsel for the respondent submits, the remedy is to bring a further appeal to a higher court.[18] That reflects the statutory nature of the jurisdiction. The change in terminology from "decision" in s 383A of the Crimes Act to "determination" in the relevant provision in the Criminal Procedure Act does not alter the position from that taken in *de Mey*.[19] Section 237(1) of the Criminal Procedure Act provides for an appeal "against the determination of the person's first appeal" which does not include a decision refusing to recall a decision on appeal for the reasons given in *de Mey*.

Is there jurisdiction to entertain a second application for leave?

[20] A refusal of leave to appeal is final, so that successive applications for leave to appeal are not permitted. To hold otherwise would be to open up the prospect of an endless series of applications.[20] Where proper grounds exist, however, a court may recall its earlier decision declining leave to appeal, and thereafter consider a second subsequent application for leave.[21] As is apparent from the Court's approach, we do not see s 213 of the Criminal Procedure Act as a bar to this procedure.

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17 *de Mey* was applied in *Blick v R* [2012] NZSC 108 at [4]; in *Lawler v R* [2013] NZSC 92 at [5], n 5; and in *Slavich v R* [2015] NZSC 195, (2015) 23 PRNZ 117 at [3].

18 We record that counsel for the Crown qualified this submission by stating this is unless the appeal right is already spent, which the Crown says is the case here.

19 Criminal Procedure Act 2011, s 237.

20 See *R v Wickliffe* [1986] 1 NZLR 4 (CA) at 11.

21 In *Egen v R*, this Court dismissed the applicant's first application for leave to appeal: *Egen v R* [2011] NZSC 156. The applicant attempted to file a further application for leave to appeal. The Court dismissed this further application, noting that if it was persuaded that leave should be granted, it would recall its earlier leave judgment and reissue a judgment granting leave: *Egen v R* [2013] NZSC 14 at [4]. However, the Court considered the further application did not meet the leave criteria and proposed "simply to dismiss the second leave application": at [4] (and see [5] and [7]). The statement in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2008] NZSC 94, (2008) 19 PRNZ 132 [*Saxmere* (leave)] at [1] that "this Court has jurisdiction to entertain a second application in the circumstances of this case" is best understood as contemplating the process set out in *Egen v R* [2013] NZSC 14. See also *Suckling v R* [2016] NZSC 133, (2016) 27 NZTC ¶22-071.

[21] This Court has also previously dismissed applications for leave to appeal but explicitly reserved rights to apply again.[22] In doing so, the ability to deal with any subsequent application for leave is preserved.

[22] In *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2),*[23] this Court said that three categories of cases had been recognised by the New Zealand courts in which a judgment may be recalled if not already perfected, adopting the following passage from the decision of Wild CJ in *Horowhenua County v Nash (No 2)* as a convenient statement of those principles:[24]

> [F]irst, where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.

[23] The Crown concedes this recall jurisdiction exists. It argues however that *Saxmere* was a civil case, and that the jurisdiction to recall is more limited in the criminal jurisdiction. It relies upon the Court of Appeal's statement in this case that the following preconditions to recall in the criminal jurisdiction must be met:[25]

(a) a "fundamental error in procedure";

(b) a substantial miscarriage of justice if the error is not corrected; and

(c) the absence of an alternative effective remedy.

[24] The Crown argues that this narrower formulation of grounds for recall is appropriate because the interest in finality weighs particularly heavily in criminal proceedings, given the impact on victims of reopening proceedings. The Crown says further that there is no need to extend the jurisdiction beyond procedural error – any other matter is properly pursued through the prerogative of mercy under s 406 of the Crimes Act.

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22 See, for example, *Bunting v R* [2019] NZSC 95 at [10]–[11]; and *Milner v R* [2015] NZSC 38, (2015) 27 CRNZ 412 at [15]. See also *Rangitira Developments Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2019] NZSC 81 at [17].

23 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76.

24 At [2], citing *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633.

25 *Uhrle* (CA recall), above n 4, at [27].

[25] While it is true that *Saxmere (No 2)* was a civil case,[26] we are satisfied that it contains a useful statement of the principles to govern application for recall in the criminal jurisdiction.[27] The Court of Appeal's statement in the present case that the jurisdiction to recall should be limited to procedural defects[28] is traced back by it to the earlier decision of that Court in *Smith*, and in particular to the following passage from Elias CJ delivering the judgment of the Court:[29]

> Recourse to the power to reopen must not undermine the general principle of finality. It is available only where a substantial miscarriage of justice would result if [a] fundamental error in procedure is not corrected and where there is no alternative effective remedy reasonably available. Without such response, public confidence in the administration of justice would be undermined.

[26] We do not consider that, properly read, *Smith* is authority for narrowing the grounds of recall for judgments in the criminal jurisdiction. Our reasons are as follows. In holding that recall was available in that case, the Court in *Smith* cited with approval the decision of the Court of Appeal of England and Wales in *Taylor v Lawrence*.[30] In that case, Lord Woolf CJ affirmed that the Court had a residual jurisdiction in exceptional circumstances to reopen an appeal already determined in order to avoid injustice, a power implicit in the Court's jurisdiction to supress abuses of its processes and control its own practice.[31] As to when the jurisdiction would be exercised, he said it would have to be an exceptional case, in which it had been established that a significant injustice had probably occurred and there was no alternative effective remedy.[32] The Court did not limit itself to errors of procedure.

[27] The Court in *Smith* relied upon *Taylor v Lawrence*. It did not say, in doing so, that it differed from the principles articulated there in any respect. While the passage from *Smith* set out above refers only to procedural error, we consider that is best

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26 *Saxmere (No 2)*, above n 23.

27 In *Suckling v R*, above n 21, at [2]–[3], this Court was also willing to apply *Saxmere* (leave), above n 21, in the context of a second application for leave to appeal in a criminal case, notwithstanding the fact that *Saxmere (No 2)* was a civil case.

28 *Uhrle* (CA recall), above n 4, at [26] and following.

29 *Smith*, above n 7, at [36].

30 At [35], citing *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528.

31 *Taylor*, above n 30, at [50]–[53]. The Court also cites at [53] Lord Morris of Borth-y-Gest in *Connelly v Director of Public Prosecutions* [1964] AC 1254 (HL) at 1301.

32 At [54]–[55]. The English position is now governed by r 36.15 of the Criminal Procedure Rules 2015 (UK).

explained by the fact that the Court was addressing an application for recall advanced on the basis of a fundamental error in the Court's procedure.

[28] Ms Brook submits that allowing the jurisdiction recognised in *Saxmere (No 2)* to apply to the criminal jurisdiction is inconsistent with the principle of finality in litigation and unnecessary in light of the prerogative of mercy. But, as was said by Lord Woolf CJ in *Taylor v Lawrence*, "It is very easy to confuse questions as to what is the jurisdiction of a court and how that jurisdiction should be exercised."[33] A consideration of the need for finality in litigation will of course weigh in the exercise of the jurisdiction, including the impact upon others of reopening proceedings. The existence of the prerogative of mercy and the Criminal Cases Review Commission Act 2019 will be relevant to the exercise of the jurisdiction,[34] but the court will need to address whether either of those is an effective and efficient remedy to the claimed miscarriage of justice.[35]

[29] As to the test to be applied, we consider that this should be formulated to make clear the decision to reopen an appeal is an exceptional step, but also to ensure the court remains able to respond to the wide variety of circumstances that may necessitate that step in order to avoid injustice. We are content that these concepts are sufficiently captured within the three grounds for recall articulated in *Horowhenua County* and approved in *Saxmere (No 2)*,[36] and in particular in the third ground: whether for any

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33 At [54].

34 Under s 406 of the Crimes Act, the Governor-General in Council, on the consideration of an application for the exercise of the prerogative of mercy, may refer the question of conviction or sentence back to the first appeal court for determination. (Section 406 was repealed on 1 July 2020 by s 54 and sch 2 of the Criminal Cases Review Commission Act 2019. If, however, the Governor-General had on 1 July 2020 received, but not yet determined, an application under s 406, he or she may exercise the powers under s 406 as if it had not been repealed: Criminal Cases Review Commission Act, sch 1 cl 3.) Similarly, the purpose of the Criminal Cases Review Commission is to decide if a case should be referred back to an appeal court: Criminal Cases Review Commission Act, ss 3, 11 and 17.

35 The court may consider that concerns as to the efficient and expeditious administration of justice arise in a particular case. There may be cases where the evidence of miscarriage is sufficiently clear that the court considers those processes under s 406 of the Crimes Act or under the Criminal Cases Review Commission Act can be circumvented .

36 Referred to above at [22].

very special reason justice requires the judgment to be recalled.[37] It is the third ground that is likely to be the most relevant in the criminal jurisdiction.[38]

Should the Court recall its earlier judgment and grant leave?

[30] The Court of Appeal dismissed Ms Uhrle's application on the basis it was an intended fresh evidence appeal and so disclosed no fundamental error by that Court or by anyone else that impeached the appellate process.[39] We need to reconsider that conclusion applying the test we have set out above.

[31] The application relies on the statement of Faamanu Fesuluai. Mr Fesuluai essentially says the attack took place at his initiative. His statement records that he forced Ms Uhrle to drive the car to the scene and that she drove off before the attack took place.

[32] Mr Fesuluai says he had taken the carving knife from the sink at home before they drove off. He forgot the knife was in his hand and thrust it into the victim's side. His statement is he thought he was just punching the victim and had no intention of killing him.

[33] He says that because it was all "over so quickly" none of the others would have been able to stop him. No other weapon was used and he dropped the knife behind a bush fence where it was later found by the police.

[34] When Mr Fesuluai got home he said Ms Uhrle was there. He also says neither Ms Uhrle or his two co-offenders knew he had the knife. To put this evidence into context, we note that the Crown case was put to the jury on the basis the jury had to be satisfied Ms Uhrle had knowledge of the weapon.

[35] We do not consider the application warrants recall and a reconsideration by this Court. There is no very special reason of justice requiring the judgment to be recalled.

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37 We make it clear we are not dealing with those cases in which the decision of the first appeal court is a nullity.

38 For example, in terms of the first ground, a failure to refer to every sentencing decision on a point would not be a basis for recall.

39 *Uhrle* (CA recall), above n 4, at [36]. See also at [34].

We agree with the submissions for the respondent that if Ms Uhrle wishes to pursue this matter it is more appropriately dealt with under the Criminal Cases Review Commission Act.

[36] The proposed evidence, in any event, faces a number of difficulties as a result of which it is not admissible.[40]

[37] First, the evidence cannot be reconciled with the forensic evidence at trial. Dr Garavan, the pathologist who gave evidence for the Crown, considered that at least four different instruments had been used in the attack.[41] Absent some expert evidence suggesting Dr Garavan's methodology or his conclusions are not correct, this aspect affects the credibility of Mr Fesuluai's statement.

[38] Second, the proposed evidence does not fit well with either that of Mr T, an independent witness who said he witnessed the attack, or with Ms Uhrle's statements to police.

[39] Mr T's evidence puts Ms Uhrle and her car by the victim while he was being assaulted. Mr T gave evidence of an exchange with a woman as the assault continued. Ms Uhrle, in the third of her evolving statements to police, described Mr T yelling at the group to stop the assault. She said her response to Mr T was to say "It's ok we are just sorting it out, he smashed my window".

[40] Finally, in terms of overall credibility, the evidence of one of the co-offenders, Esau Vailagilala, was that Ms Uhrle was the leader of the group.

Result

[41] For these reasons the application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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40 *Lundy v R* [2013] UKPC 28, (2013) 26 CRNZ 699 at [120]; and see *Misa v R* [2019] NZSC 134 at [57].

41 Dr Garavan described the variations in the wounds. He contrasted, for example, one wound as showing a "[c]risp, clean incision" unlikely to have been caused by a serrated blade with another "rectangular-shaped wound" likely to have been caused by a different weapon.