NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 144/2016
[2020] NZSC 95

BETWEEN	LESLIE MCGEACHIN Applicant
AND	THE QUEEN Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: Applicant in person
S K Barr for Respondent

Judgment: 14 September 2020

JUDGMENT OF THE COURT

The application for recall of this Court's judgment of 24 February 2017 (*McGeachin v R* [2017] NZSC 16) is dismissed.

REASONS

Introduction

[1] Mr McGeachin was convicted following a jury trial in 2013 for offences of physical and sexual violence committed against two former partners (JO and CF) between the late 1980s and 2011.

[2] Mr McGeachin's appeal against his convictions was dismissed by the Court of Appeal in 2015.[1] This Court dismissed his application for an extension of time to

[1] *McGeachin v R* [2015] NZCA 558 (Kós, Fogarty and Mallon JJ).

appeal to this Court in February 2017.[2] It also dismissed his first application for a recall of that decision in late 2017.[3]

[3] In August 2018, this Court deferred its decision in relation to Mr McGeachin's second application for a recall, in order for him to make an application to the Court of Appeal for recall of its decision on his appeal.[4] On 20 March 2020, the Court of Appeal declined his recall application to that Court.[5]

[4] Mr McGeachin has now renewed his second application for recall of this Court's leave decision.

Background

[5] The main issue raised by Mr McGeachin in his second recall application to this Court was that the Evidential Video Interview (EVI) of one of the complainants had been edited before being presented to the jury at his trial. His argument was that this editing removed material indicating that there may have been collusion between the two complainants.

[6] The Court of Appeal at its 2015 appeal hearing was not aware that editing of this nature had occurred as the affidavit of trial counsel, Ms Brown, said the relevant deletions had not been made.

[7] This Court sought submissions on this point. The Crown agreed the deletions had been made but submitted these were immaterial. This Court, in its minute of 10 August 2018, said:[6]

> [11] It is not clear that the Supreme Court is the best venue for the resolution of that dispute. It may be that to allow it to be dealt with definitively, further evidence may need to be adduced and possibly that cross-examination may be required. It would be unusual for this Court to hear evidence (including cross-examination and re-examination). And, more importantly, if we were to do so and determine the issues in dispute, we would

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2 *McGeachin v R* [2017] NZSC 16 (Glazebrook, Arnold and O'Regan JJ). This judgment also declined Mr McGeachin leave to appeal against his sentence.
3 *McGeachin v R* [2017] NZSC 193 (Glazebrook, O'Regan and Arnold JJ).
4 Minute of the Court (Glazebrook, O'Regan and Ellen France JJ) dated 10 August 2018.
5 *McGeachin v R* [2020] NZCA 72 (Wild, Whata and Katz JJ) [CA recall judgment].
6 Minute, above n 4.

> not have the benefit of the Court of Appeal's consideration of the evidence and other material and there would be no possibility of appeal for either party if they were dissatisfied with the outcome.

[8] This Court said that it would defer further consideration of the application to allow Mr McGeachin to make a recall application to the Court of Appeal. Leave was reserved to apply to this Court for renewed consideration of his application for recall to this Court.

Court of Appeal recall decision of 20 March 2020

[9] The Court of Appeal, by minute of 7 December 2018, appointed Ms Hall to assist the Court with the recall application. She concluded that a number of grounds might properly be advanced.[7]

[10] An application was then filed by Ms Levy QC, on behalf of Mr McGeachin, for rehearing of the appeal. The following grounds were identified:[8]

(a) The Court hearing the appeal on 10 November 2015 relied upon the affidavit of trial counsel as to the evidence before the jury and the affidavit has subsequently been shown to be incorrect on a critical point; and

(b) Mr McGeachin had raised numerous issues with the affidavit of trial counsel, but no cross-examination occurred. The issues to be raised in cross-examination were capable of affecting the outcome of the appeal.

[11] The Court said that the consistent position adopted by Mr McGeachin for the purpose of recall was that his trial counsel had misled the Court about a key matter in issue, namely whether critical passages in the EVI of one of the complainants, JO, were put to the jury. Mr McGeachin also submitted that trial counsel misled the Court about some other issues, including about cross-examination on collusion between the two complainants and of JO on cannabis use. Mr McGeachin's 2015 appellate counsel

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7 CA recall judgment, above n 5, at [25].
8 At [26].

Mr Dean had, it was submitted, compounded these errors by failing to cross-examine trial counsel at the hearing of the appeal.[9]

[12] The Court noted that one of the episodes of alleged offending involved alleged assaults of the children of one of the complainants (CF). Judge Hobbs severed the charges based on these allegations from the sexual violation charges. Because of this severance, trial counsel were tasked with the responsibility of deleting the corresponding passages from the EVIs. The relevant deletions are set out in the Court of Appeal recall judgment.[10] The deletions included a statement by complainant JO that CF had contacted the police on JO's behalf before she made her statement to the police. In the original appeal, trial counsel had deposed that this had not been deleted from the EVI.

[13] Both Mr McGeachin and his trial counsel provided further affidavits in relation to the recall application. These were considered by the Court of Appeal as well as the affidavits in the original appeal. Both were cross-examined.[11] Mr McGeachin's appellate counsel also gave evidence and accepted that, with the benefit of hindsight, he should have cross-examined trial counsel.[12]

[14] The Court was satisfied that the errors in the trial counsel's affidavit amounted to a fundamental procedural error in relation to the appeal and that these were compounded by appellate counsel's failure to cross-examine her.[13] The Court was, however, satisfied that there was no need to rehear the appeal because there was no merit to Mr McGeachin's substantive claims.[14]

[15] The Court dealt first with the transcripts and the deletions. It preferred trial counsel's version of events, namely that she reviewed the EVIs with Mr McGeachin and he agreed with the edits to them. The Court noted that the record strongly supports her account.[15]

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9 At [27].
10 At [30].
11 At [35]–[60].
12 At [62].
13 At [69].
14 At [70].
15 At [72].

[16] The Court considered that there was no real possibility that omitting the deleted passages affected the outcome of the trial.[16] The passages do not evidence collusion between JO and CF in relation to their respective complaints against Mr McGeachin. At most, these statements demonstrate some cooperation between JO and CF in relation to the assaults on the children. Conversely, the opening up of further evidence of gratuitous violent offending by Mr McGeachin against the children would have inevitably been prejudicial to him. Thus, there was no real possibility that the jury would have placed any significance favourable to Mr McGeachin on the deleted passages.[17]

[17] The Court also saw nothing in the alleged failure to cross-examine one of the children about collusion or more generally about the relationship between JO and CF. The Court said that it would have been, at the time of trial, speculative to think cross-examination would have yielded anything helpful to Mr McGeachin on the key issue of collusion.[18] As to cross-examination on cannabis usage, the Court could see no prejudice to Mr McGeachin arising from its omission.[19]

[18] The Court also considered that, while it would have been prudent to cross-examine trial counsel at the first hearing, it would not have materially affected the outcome.[20]

[19] Further submissions were filed by Mr McGeachin after the hearing. The Court was satisfied Mr McGeachin had a full opportunity to test both the outcome of the trial and the appellate process, and that there was nothing in the further submissions that suggested that there had been a substantial miscarriage of justice.[21]

Grounds of application

[20] Mr McGeachin submits that a miscarriage of justice has arisen from the edits to JO's EVI. He maintains that he was unaware of these and that the deleted material

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16 At [74].
17 At [75].
18 At [76].
19 At [77].
20 At [79].
21 At [81].

was fundamental to his collusion submission at trial. Also fundamental on collusion, he maintains, was trial counsel's decision not to cross-examine one of the children about the relationship between JO and CF. He submits that errors in trial counsel's affidavit that the Court of Appeal accepted had occurred render the entire affidavit unreliable and that all these matters must be considered afresh. He also says there are other problems in the transcripts compared to the EVIs that mean they cannot be relied upon.

[21] Mr McGeachin further argues that there was scene contamination, mishandling of evidence and inadequate disclosure. He raises issues with certain evidence that was put before the jury. Finally, he questions tactical decisions by trial counsel not to bring other evidence that, he says, would have brought the complainants' credibility into question. Overall, he submits that the trial was unfair and his convictions are therefore unsafe.

Crown submissions

[22] The Crown accepts trial counsel's affidavit contained the errors identified in the Court of Appeal recall judgment but submits that these do not provide a proper basis for this Court to recall its leave decision, for the same reasons that the Court of Appeal did not recall its earlier decision. The Crown submits that the other issues raised by Mr McGeachin have already been adequately traversed by both the Court of Appeal and this Court. It does not accept that there is any substance to the other concerns raised by Mr McGeachin and submits that trial counsel's decisions were reasonable.

Our assessment

[23] All of the points raised by Mr McGeachin relate to the facts of his particular case. No point of general or public importance arises.[22]

[24] Further, the Court of Appeal in its latest recall decision has thoroughly examined Mr McGeachin's complaints about his original appeal and concluded there

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22 Supreme Court Act 2003, s 13(2)(a).

is no risk of a miscarriage of justice.[23] Nothing raised by Mr McGeachin suggests the analysis of the Court of Appeal was in error.

[25] Nor do we consider the additional matters Mr McGeachin seeks to raise create any risk of a miscarriage of justice. Most of these issues have in any event previously been raised, whether in the submissions for the original Court of Appeal decision, this Court's leave decision, or the Court of Appeal's recall decision.

[26] Therefore, although the original Court of Appeal decision proceeded upon certain errors, and in turn so did the original leave decision in this Court, there is no basis for considering that an incorrect decision was reached. There is no basis therefore for our leave judgment to be recalled.[24]

Result

[27] The application for recall is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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23 Section 13(2)(b).
24 *Uhrle v R* [2020] NZSC 62 at [29].