IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 109/2018
[2022] NZSC 150

BETWEEN	GEORGE ROBERT JOLLEY Applicant
AND	THE KING Respondent

Hearing:	1 November 2022
Court:	Winkelmann CJ, Glazebrook, Ellen France, Kós and William Young JJ
Counsel:	J D Munro, J N Olsen and J W Wall for Applicant M J Lillico and T C Didsbury for Respondent
Judgment:	19 December 2022

JUDGMENT OF THE COURT

The application for recall of this Court's judgment of 1 April 2019 (*Jolley v R* [2019] NZSC 34) is dismissed.

REASONS
(Given by Ellen France J)

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Introduction

[1] The applicant, Mr Jolley, was convicted of attempted murder, participating in an organised criminal group, and unlawfully being in an enclosed building. He appealed unsuccessfully to the Court of Appeal against conviction.[1] This Court declined leave to appeal.[2] Some time later, the applicant applied to the Court of Appeal for recall of that Court's earlier judgment. Recall was sought on the basis that there was fresh evidence which gave rise to a reasonable possibility that, if the new evidence was before the jury, a different outcome on the attempted murder charge would have resulted.[3] The Court of Appeal declined to recall the Court's earlier judgment.[4] The applicant then made the present application asking this Court to recall its previous decision declining leave to appeal. The application is opposed by the respondent.

[2] It is common ground that whether we should grant recall turns on whether this is a situation where "for any very special reason justice requires" recall. That is the relevant test for recall as set out by this Court in *Uhrle v R*.[5] As we shall explain, in this case that question turns on whether the availability of referral to Te Kāhui Tātari Ture | Criminal Cases Review Commission provides the applicant with an effective and efficient remedy to the claimed miscarriage of justice. In addition, as we indicated to the parties in setting the application down for an oral hearing,[6] it is useful to provide some further guidance on the test set out in *Uhrle* in light of the approach adopted by the Court of Appeal in this case and in the earlier decision of *Lyon v R*.[7] There is no right of appeal from the decision of the Court of Appeal declining recall so our

1 *Jolley v R* [2018] NZCA 484 (Asher, Courtney and Moore JJ).
2 *Jolley v R* [2019] NZSC 34 (William Young, O'Regan and Ellen France JJ).
3 See *Misa v R* [2019] NZSC 134, [2020] 1 NZLR 85 at [48].
4 *Jolley v R* [2022] NZCA 295 (French, Courtney and Moore JJ) [CA recall judgment].
5 *Uhrle v R* [2020] NZSC 62, [2020] 1 NZLR 286 at [29].
6 *Jolley v R* SC 109/2018, 27 September 2022.
7 *Lyon v R* [2020] NZCA 430.

comments on that Court's decision are directed to parameters of the recall test and its application more generally.[8]

[3] The latter question is a point of general importance so we deal with it first after setting out the background. We will then turn to the application of the test to this case.

Background

[4] The events giving rise to the charges took place in December 2015 in the course of a confrontation between members and associates of the Mangu Kaha and the Mongrel Mob gangs. Wade Pereira was shot in the head and neck and seriously injured. His brother, Benjamin Pereira was shot in the arm.

The trial

[5] The applicant, along with a number of other defendants, faced trial in 2017 on charges arising out of the confrontation. In terms of the applicant, the main issue at trial on the attempted murder charge was as to the identity of the person who shot the Pereira brothers. The Crown case relied primarily on the evidence of two persons present during the confrontation, both of whom knew Mr Jolley from previous dealings and both of whom identified him as the shooter.[9]

[6] Mr Jolley did not give evidence but his defence that he was not the man who shot Wade Pereira relied on what were said to be inconsistencies in the identification evidence. One of the two eye-witnesses said the shooter had "bluey, greeny eyes" and the other witness said the shooter was wearing long pants. The applicant had brown eyes and was photographed as wearing shorts. Second, the defence questioned the credibility and reliability of the eye-witnesses' evidence. Both admitted to being drug users. Next the defence relied on evidence from a police officer that immediately after the shooting, one of the two eye-witnesses had expressed uncertainty as to the identity of the shooter. The defence also challenged the explanation for this given by the witness, namely, that he did not want to be a snitch. Finally, the defence questioned

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8 *Uhrle*, above n 5, at [19].
9 The two were at the time protected witnesses.

whether the second of the eye-witnesses was in a position from which to identify the shooter.

[7] It is clear that the jury accepted the eye-witnesses' account as the applicant was found guilty of attempted murder. He was subsequently sentenced to a term of 11 years' imprisonment.[10]

[8] It is not necessary to discuss the grounds of Mr Jolley's first appeal to the Court of Appeal and those in his application for leave to this Court. We note only that various grounds were raised, including a question about the jury vetting process.

The proposed new evidence

[9] The proposed new evidence comes from the victim of the attempted murder, Wade Pereira, and from his brother, Benjamin Pereira. Both men have filed affidavits saying the applicant was not the person who shot them. Rather, they say that while Mr Jolley had the gun and fired an initial shot, that initial shot was fired into the ground. Someone else, whom neither man identifies, then obtained the gun and fired it, hitting Wade Pereira.

The approach to recall

The decision of the Court of Appeal in Jolley

[10] In determining that the application for recall should be dismissed, the Court of Appeal noted that the ground for recall relied on was whether, for any very special reason justice required the judgment to be recalled. In this context, the Court discussed *Lyon* which had considered this Court's decision in *Uhrle*. Drawing on *Lyon*, the Court described the test for recall as follows:[11]

> … recall is not ordinarily available where there is a further statutory right to appeal or to seek leave to do so — the jurisdiction to recall is incidental to those rights, not a substitute for them — or some other effective remedy such as application for the prerogative of mercy or application to the Criminal Cases Review Commission (Te Kāhui Tātari Ture). It is a jurisdiction that is exceptional and discretionary, requiring that a real or significant or substantial

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10 *R v Jolley* [2018] NZHC 93 (Katz J).
11 CA recall judgment, above n 4, at [5] (footnotes omitted).

> injustice has probably occurred. The grounds for recall must impeach the judgment that is the subject of the recall application and the Court will only conclude that very special reasons require recall where the applicant has shown that its previous judgment has probably occasioned a substantial injustice.

[11] The Court then discussed the application for recall and the material in the affidavits from Wade and Benjamin Pereira. The Court set out the submissions for the parties on whether the evidence was fresh, credible and cogent. The Court did not determine this issue. Instead, it held that recall was "not appropriate where an effective alternative remedy is available".[12] The effective alternative remedies identified were for Mr Jolley to renew his application to the Supreme Court for leave to appeal or to apply to Te Kāhui Tātari Ture. There was "accordingly no basis for recall".[13]

The test in Uhrle

[12] The Court in *Uhrle* said that the concepts identified in the tests for recall of a judgment in the civil jurisdiction set out in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)*[14] were applicable to recall applications in the criminal jurisdiction. In particular, the third of the three grounds for recall approved in *Saxmere (No 2*), namely, "whether for any very special reason justice requires the judgment to be recalled" was "likely to be the most relevant in the criminal jurisdiction".[15] We note that in this case the respondent helpfully provided information about the numbers of applications for recall considered, respectively, by this Court post-*Uhrle*, and by the Court of Appeal post-*Lyon,* which indicated the numbers of such cases in the two Courts were comparable.

[13] As we read the judgments, the Court of Appeal in *Lyon* and in the present case has retreated somewhat from the test in *Uhrle*. The differences no doubt reflect, as the respondent submits, the wish to provide further guidance for that Court in grappling with applications like the present. But, in doing so, the Court has added further

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12 At [16].
13 At [16].
14 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76. As noted in *Saxmere*, these three grounds were set out in *Horowhenua Country v Nash (No 2)* [1968] NZLR 632 (SC) at 633.
15 *Uhrle*, above n 5, at [29].

barriers to an application for recall. Those additional barriers are neither necessary nor consistent with *Uhrle*, as we now explain.

[14] The first point that arises from the excerpt above is the suggestion that the very special reason test will only be met where an applicant shows the previous judgment has probably led to a substantial injustice. Adding to that is the Court's observation that "[t]he grounds for recall must impeach the judgment that is the subject of the recall application". The expression of the test in these ways detracts from the flexibility allowed by the *Uhrle* formulation. The Court in *Uhrle* described the test as whether "for any very special reason justice requires the judgment to be recalled" so that it was clear that the decision to recall "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".[16]

[15] The test is, deliberately, a simple and flexible one. For example, in settling on the test, the Court rejected the submissions for the respondent in *Uhrle* that recall was only appropriate to respond to a "fundamental error in procedure".[17] In short, the effect of *Uhrle* is that there are no additional preconditions to the exercise of the jurisdiction. We accordingly do not accept the submission for the respondent that the Court in *Lyon* was simply fleshing out the *Uhrle* test.

[16] We add that the sorts of concerns we envisage underlay the Court of Appeal's reformulation in *Lyon* are met by the recognition in *Uhrle* that finality is a relevant value as is the availability of an effective and efficient remedy other than recall.

[17] The second general matter is to make it clear that the possibility of an application for recall of this Court's earlier decision to decline leave was not an effective alternative remedy in the circumstances of this case. As the applicant submits, it is less than desirable for this Court to deal, effectively as a court of first instance, with an application based on proposed new evidence where cross-examination may be necessary. The point is that "substantial evidential

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16 At [29].
17 At [23].

exercises … are not a central part of this Court's role".[18] Instead, it is preferable that the Court of Appeal consider the merits of an application such as this one at least so that it would be apparent on what basis the Court considered that referral to Te Kāhui Tātari Ture was an effective alternative. We do not understand the respondent to dispute that was the preferable approach in this case.

Should the Court recall its earlier judgment declining leave to appeal?

[18] We turn then to whether the availability of referral to Te Kāhui Tātari Ture provides Mr Jolley with an effective and efficient remedy to the claimed miscarriage of justice. As we have noted, the Court in *Uhrle* said that the ability to refer to the Commission was relevant in the context of an application for recall. But it would be necessary to consider whether the alternative remedy was effective and efficient. The Court also said that "[t]here may be cases where the evidence of miscarriage is sufficiently clear that the court considers those processes [the prerogative of mercy or reference to Te Kāhui Tātari Ture] can be circumvented".[19] It is relevant in this respect that, as we note below, the result of a finding in favour of an applicant by Te Kāhui Tātari Ture is to refer the matter back to the High Court or Court of Appeal.[20] If the evidence of miscarriage is sufficiently clear or where the claimed miscarriage can be worked through within the normal court processes, it will not be efficient to require an applicant to proceed via the Commission. This is not one of those cases.

[19] Rather, it is apparent that in order to assess the claimed miscarriage, further investigation would be necessary. As the Court in *Lyon* discussed, recall applications may be able to be dealt with on the papers. However, cross-examination may on occasion be necessary as some applications will require some testing of the evidence. In this case, even assuming cross-examination would be appropriate in this Court, cross-examination might not resolve the issues that arise out of the proposed new evidence in this case. Rather, a more substantial evidential exercise might be required as we now explain.

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18 *F (SC 107/2021) v R* [2021] NZSC 166 at [10].
19 *Uhrle*, above n 5, at [28], n 35.
20 Below at [21].

[20] The first point to note is that we do not accept the applicant's submissions that the proposed new evidence raises questions about the identity of the shooter. Rather, what would be put in issue is a question about the narrative of events. In particular, the issue would be whether, contrary to the defence at trial,[21] Mr Jolley fired a shot but that it was directed into the ground. There would, on this new narrative, be no issue as to the identification of Mr Jolley as the person initially holding the gun and discharging it. That may in turn raise the question of whether Mr Jolley would in any event be a party to attempted murder. Determining the cogency of this proposed new narrative would require investigating the relevant forensics of the ground at the scene.

[21] Second, Te Kāhui Tātari Ture has the necessary powers to undertake an investigation into issues of this nature. Under the Criminal Cases Review Commission Act 2019, the primary function of the Commission is to "investigate and review convictions and sentences".[22] The Commission has and may exercise all powers necessary to perform its function.[23] Its express powers include both general and specific powers to require the production of documents and so on and to require persons to appear and to give evidence on oath or affirmation.[24] The Commission also has the ability to seek enforcement orders where its requirements are not met.[25] Following an inquiry into conviction, if of the view that the interests of justice so require, the Commission can refer the convictions to the High Court or Court of Appeal,[26] which would then deal with the reference as if it were a first appeal.[27]

[22] The applicant argues that the Court cannot be satisfied Te Kāhui Tātari Ture is an effective and efficient remedy. That is because the Commission is in its relative infancy with the result that, unlike its counterpart in the United Kingdom, there had been no referral from the Commission to the High Court or Court of Appeal as at the time of the hearing.[28] The argument is accordingly that there is no metric to measure

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21 We note the absence of an affidavit from Mr Jolley adopting the new narrative.
22 Criminal Cases Review Commission Act 2019, s 11; and see the purpose section, s 3.
23 Section 14.
24 Sections 31–33.
25 Section 34.
26 Section 17.
27 Section 20.
28 We note that since the hearing, there has been one reference to the Court of Appeal. See Te Kāhui Tātari Ture | Criminal Cases Review Commission "CCRC refers its first criminal case after 'young person' jailed for assault (press release, 13 December 2022).

the effectiveness of this alternative. The applicant also refers to the likely delay before the matter would be resolved by the Commission.

[23] It is a sufficient answer to these submissions to point to the various investigatory powers of Te Kāhui Tātari Ture and to emphasise the need for such powers in order to be able to address the miscarriage claimed by Mr Jolley. It is not appropriate for the Court to attempt to pre-empt the types of matters that the Commission may see fit to investigate if the matter is referred to them but we give two examples simply to illustrate our point. We note first that, as framed, the application raises a potential question as to whether there is anything in the forensic evidence to support the assertion that Mr Jolley fired the gun into the ground. As a further illustration, we note that there may be issues requiring investigation about what the other two eye-witnesses, or others present at the scene, may have seen in light of the alternative narrative suggested by the two deponents. In terms of the prospect of further delay, in these circumstances, this is a matter Mr Jolley will have to raise with the Commission.

[24] Given our view as to the availability of an effective alternative remedy, it is not necessary for us to determine the application to adduce new evidence.

Result

[25] For these reasons, we are satisfied that there is no very special reason justice requires recall. The application for recall of this Court's judgment of 1 April 2019 (*Jolley v R* [2019] NZSC 34) is accordingly dismissed.

Solicitors:
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