IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 107/2021
[2021] NZSC 166

BETWEEN	F (SC 107/2021) Applicant
AND	THE QUEEN Respondent

Court: William Young, O'Regan and Williams JJ

Counsel: P E Dacre QC and R L Thomson for Applicant
M R L Davie for Respondent

Judgment: 2 December 2021

JUDGMENT OF THE COURT

The application for recall of this Court's judgment of 17 March 2017 (*F (SC 129/2016) v R* [2017] NZSC 34) is dismissed.

REASONS

[1] In August 2015, the applicant was tried by a jury on nine charges of sexual offending against his former wife.[1] His primary defence at trial in relation to most

[1] The trial Judge discharged him on another two charges.

(although not all) of the charges was sexsomnia—that he had been asleep at the time. He was found guilty of three of the charges—one of rape and two of indecent assault. A distinguishing feature of the evidence in relation to the incidents in respect of which he was found guilty was that he had spoken during the activity complained of. In relation to one of the charges of indecent assault, there was the further distinguishing feature that the applicant, having initially claimed to have been asleep, later acknowledged both to his former wife and then to the police that he had been awake throughout the incident. At trial, Dr Antonio Fernando, a psychiatrist who specialises in sleep disorders, gave evidence for the Crown in relation to sexsomnia. He said that in instances of sexsomnia there is generally no communication.

[2] The applicant's appeal against conviction was dismissed by the Court of Appeal,[2] as was an application for an extension of time to seek leave to appeal to this Court.[3]

[3] After his release from prison, the applicant consulted Dr Fernando as a patient. On the basis of his interactions with the applicant and more extensive review of the literature, Dr Fernando came to an opinion more favourable to the applicant's sexsomnia defence than the one he had expressed to the jury.

[4] In 2019, the applicant applied to the Court of Appeal for a recall of its earlier judgment. This was on the basis of the different and more favourable view that Dr Fernando now has in relation to his defence. This application was dismissed.[4]

[5] He now seeks leave to appeal against the Court of Appeal's judgments dismissing the conviction appeal and declining a recall. This application is based on affidavits from Dr Fernando and another sleep disorders expert, Dr Colin Shapiro, which provides further support for the sexsomnia defence.

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2 *F (CA705/2015) v R* [2016] NZCA 180.
3 *F (SC 129/2016) v R* [2017] NZSC 34 (Glazebrook, O'Regan and Ellen France JJ).
4 *F (CA270/2019) v R* [2019] NZCA 447.

[6] There are jurisdictional issues with the application. There is no jurisdiction for this Court to hear an appeal against the Court of Appeal recall judgment.[5] As well, given the earlier judgment of this Court refusing an extension of time, the applicant's attempt to challenge again the Court of Appeal's judgment dismissing his conviction appeal should probably be by way of recall of the earlier judgment of this Court.[6] Indeed, as will be apparent from the order band, we have decided to treat the application as seeking a recall of that judgment. So treated, the application faces the difficulty that nothing raised by the applicant suggests that that judgment was erroneous on the material then before the Court. As well, there may be difficulty establishing the "very special reason" requirement.[7]

[7] As well as the jurisdictional issues just identified, there are two other factors that suggest recourse to a more inquisitorial forum might be the preferable option.

[8] The first is that the new evidence relied on is not particularly fresh. It is largely a development of the defence as advanced at trial. This is not in itself fatal to reconsideration but is likely to prove at least distracting on an appeal to this Court given its potential to generate inquiry into why evidence along the lines now tendered was not produced at trial. Likely complicating factors are Dr Fernando's earlier role as a Crown witness and later change of position and the issues raised by the Crown as to the tone of the material supplied by Dr Shapiro.

[9] The second factor relates to one of the charges of indecent assault. Sexsomnia could not be relied on in relation to this charge given the applicant's admissions that he had been awake at the time. This did not mean that no defence was available. If the jury had accepted the sexsomnia defence on the other charges, it is at least possible that it would have acquitted on this charge too. What is perhaps more significant for present purposes is that the lie told by the applicant at the time could be seen as casting a shadow over his sexsomnia defences to the other charges. Assessing the weight of

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5 Part 6 of the Criminal Procedure Act 2011 only authorises appeals to this Court "against the determination of an appeal". A decision refusing to recall a judgment is not a determination of the first appeal: *Uhrle v R* [2020] NZSC 62, [2020] 1 NZLR 286 at [19].

6 This would be the case if the earlier judgment had dismissed his application for leave to appeal: see *Uhrle*, above n 5, at [20]. The earlier judgment was, in substance, a dismissal of his leave application.

7 See *Uhrle*, above n 5 at [29].

this consideration would require some or perhaps considerable assessment of the dynamics of the relationship between the applicant and his former wife.

[10] Difficulties associated with the two factors just mentioned could, if necessary, be dealt with on appeal to this Court. But, although in rare instances similarly factual issues have been so dealt with, substantial evidential exercises of this nature are not a central part of this Court's role. The applicant has the alternative option of going to Te Kāhui Tātari Ture | the Criminal Cases Review Commission.[8] It can inquire into the convictions and, if of the view that the interests of justice so require, can refer the convictions to the Court of Appeal,[9] which would then deal with the reference as if it were a first appeal.[10]

[11] The applicant has been released from prison. There is thus no pressing urgency. Against the background outlined, we see the Criminal Cases Review Commission as providing a better mechanism for the applicant to pursue his concerns.

[12] The application for recall of this Court's judgment of 17 March 2017 is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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8 Criminal Cases Review Commission Act 2019, s 4 definition of "eligible person" and s 21.
9 Section 17.
10 Section 20.