

**NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF
COMPLAINANT PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT
1985.**

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 39/2017
[2022] NZSC 7**

BETWEEN S (SC 39/2017)
 Applicant

AND THE QUEEN
 Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: Applicant in person
 M L Wong for Respondent

Judgment: 17 February 2022

JUDGMENT OF THE COURT

- A The application for an oral hearing is dismissed.**
**B The application for appointment of counsel as amicus
 curiae is dismissed.**
**C The application for recall of this Court's judgment of
 16 November 2017 (*S (SC 39/2017) v R*) is dismissed.**
-

REASONS

Introduction

[1] Mr S has filed an application for leave to appeal against a decision of the Court of Appeal.¹ The Court of Appeal dismissed Mr S's appeal against conviction for sexual offending against his stepdaughter who was aged between nine and 14 at the time of the offending.

¹ *S (CA361/2010) v R* [2013] NZCA 179 (Stevens, Allan and Clifford JJ).

[2] This is Mr S's second application for leave to appeal. His previous application was dismissed in 2017 in *S (SC 39/2017) v R* (the 2017 judgment).² We therefore treat this as an application for recall of the 2017 judgment.³

Recall applications

[3] The general rule is that a judgment, once delivered, must stand for better or worse, subject to appeal.⁴ A decision to recall a judgment will only be made in exceptional circumstances.⁵ A recall application cannot be used to relitigate the reasons provided in the leave judgment.⁶ Nor can it be a means of collateral attack on a decision.⁷ Recall will be appropriate where some procedural or substantive error has occurred that would result in a miscarriage of justice.⁸

Grounds of application

[4] Mr S argues that he has suffered a miscarriage of justice because:

- (a) the medical opinion evidence adduced at trial was incorrect and misled the jury;
- (b) trial counsel failed to call a crucial defence witness and also failed to introduce evidence that corroborated Mr S's evidence;
- (c) the Court of Appeal should not have accepted trial counsel's evidence on Mr S's claim of inadequate representation by trial counsel;
- (d) the Crown failed to follow up on evidence that would have corroborated Mr S's statements in evidence; and

² *S (SC 39/2017) v R* [2017] NZSC 169 (Elias CJ, William Young and O'Regan JJ).

³ *Uhrle v R* [2020] NZSC 62, [2020] 1 NZLR 286 at [20].

⁴ *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633, as cited in *Craig v Williams* [2019] NZSC 60 at [10]. Exceptions to this are discussed in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76 at [2]; and *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 115 at [20].

⁵ *Wong v R* [2011] NZCA 563 at [13]; and *Uhrle v R*, above n 3, at [29].

⁶ *Nuku v District Court at Auckland* [2018] NZSC 39 at [2].

⁷ *R v Palmer* CA334/03, 18 October 2004 at [29].

⁸ *Uhrle v R*, above n 3, at [27].

- (e) the deposition Judge erred in allowing admission of the evidential video interview of the complainant because she did not take an oath or make an affirmation during the interview.

[5] Mr S seeks leave to file reply submissions. He also seeks an oral hearing and for an amicus curiae to be appointed.

Our assessment

[6] We do not consider that we would be assisted by hearing oral submissions. We have considered all the written submissions by Mr S. Nor do we consider it necessary to appoint counsel as amicus curiae, particularly in light of the fact that this is Mr S's second application for leave to appeal.

[7] Mr S's application does not meet the high threshold for a recall. Most of the arguments that Mr S advances have been thoroughly dealt with in the decision of the Court of Appeal or the 2017 judgment of this Court, or both. Any errors alleged are peripheral and would not have affected the outcome of the trial. Mr S's application is largely an attempt to relitigate matters already determined by this Court. There is no risk of a miscarriage of justice.

Result

[8] The application for an oral hearing is dismissed.

[9] The application for appointment of counsel as amicus curiae is dismissed.

[10] The application for recall of this Court's judgment of 16 November 2017 (*S (SC 39/2017) v R*) is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent