NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

NOTE: SUPREME COURT ORDER EXTENDING THE HIGH COURT INTERIM ORDER ([2021] NZHC 1213) AND COURT OF APPEAL INTERIM ORDER ([2023] NZCA 56) SUPPRESSING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF THE APPLICANT UNTIL FURTHER ORDER OF THE COURT.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 19/2023
[2023] NZSC 55

BETWEEN	JAMES HAY WALLACE Applicant
AND	THE KING Respondent

Court: Glazebrook, Williams and Kós JJ

Counsel: D P H Jones KC for Applicant
M J Lillico and I A A Mara for Respondent

Judgment: 16 May 2023

JUDGMENT OF THE COURT

The application for recall of this Court's judgment of 21 March 2023 (*Wallace v R* [2023 NZSC 24) is dismissed.

REASONS

[1] The applicant applies for recall of this Court's leave judgment in *Wallace v R* dismissing his application for leave to appeal.[1] The background is set out in that decision and need not be repeated here.

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1 *Wallace v R* [2023] NZSC 24 (Glazebrook, Williams and Kós JJ) [SC leave judgment].

Submissions

[2] Three grounds are advanced. First, it is argued that Mr Wallace was prejudiced by an unorthodox and truncated process. Second, it is argued that the Court failed to address key leave grounds "in any detail or at all". Finally it is argued that the panel mischaracterised the trial evidence and appeal points.

[3] The Crown opposes the application arguing, in essence, that the applicant is simply rehashing arguments that this Court rejected in the leave judgment.

[4] As the parties acknowledge, recall is an exceptional procedure. This is inherent in the third of the *Horowhenua County v Nash (No 2)* recall grounds upon which Mr Wallace relies — that for a "very special reason" justice requires recall.[2]

Process

[5] The applicant challenges the process adopted by this Court in considering his leave application. The Court expedited the process in light of the fact that the applicant sought bail and his prison sentence was such that he would soon be eligible for parole. He complains that the truncated period for filing of his leave submissions was unfair.[3]

[6] There is no merit in this ground. As the Crown indicated, Mr Wallace was advantaged by the process we adopted since he in fact had two opportunities to submit arguments in support of his application; the first was his initial bail submissions in which he fully traversed the grounds of appeal in a lengthy application, and the second was his substantive leave submissions. In any event, Mr Wallace points to no matter

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2 *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC); approved in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76. See the application of the test in the criminal context in *Uhrle v R* [2020] NZSC 62, [2020] 1 NZLR 286 at [29].

3 The applicant filed his application for leave to appeal, and his application and submissions for bail, on 21 February 2023. The Crown responded to the bail submissions on 24 February 2023 and asked this Court to treat the applicant's bail submissions as the submissions for leave also. The Court accepted and the Crown filed submissions in response to the application for leave on 8 March 2023. Also on 8 March 2023, the applicant filed a memorandum disputing the process. A teleconference was held and a further timetable was agreed by counsel and the Court. The applicant would file leave submissions by 14 March 2023. Those submissions were filed on that date. The Crown had to advise whether it wished to file further submissions, and file those by 15 March 2023. The Crown chose not to file further submissions. The decision dismissing leave to appeal and bail was made on 21 March 2023: SC leave judgment, above n 1.

that he would have covered, or more fully or better covered, but for the expedited procedure.

Mischaracterisation

[7] Nor is there anything in the argument that this Court mischaracterised or misunderstood the applicant's submissions. Leave to bring a second appeal is a summary procedure and the reasons that must be provided for dismissal of a leave application may be brief and in general terms only.[4] We are not at all persuaded by the suggestion that this Court's treatment of submissions did other than address the grounds in a manner consistent with statutory requirements. Recasting and summarising counsel's submissions is not only a necessary means of assessing applications, it is the best way of cutting through unclear or nuanced language to get to the underlying point or points.

[8] In this case the panel took the view that only one of the proposed grounds was of sufficient substance to warrant detailed treatment. In coming to that view we considered the entire case on appeal including all notes of evidence, all judgments and directions in the Courts below and submissions of counsel for both sides as we do in all applications for leave. The ends of justice would not be served by tracking through the details of each argument at the leave stage. An application for leave to appeal is not an opportunity to have a first run at the second appeal itself either for the applicant or for this Court. We remain of the view that the only issue that required detailed treatment was that relating to timing and s 9 of the Evidence Act 2006.

Section 9

[9] Mr Wallace argues that "a key issue" in the leave application was the legal effect of admissions of fact under s 9(2) and (3) and how these differ from evidence adduced under s 9(1) of the Evidence Act. He says this has not been addressed and should have been. Counsel refers to paras [2]–[4] and [15]–[18] of the leave submissions in support of his point.

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4 Senior Courts Act 2016, s 77(2).

[10] If the argument is now that the jury was bound by the s 9 admission, then that is not what the leave submissions argued. Rather the argument was a more nuanced procedural fairness one: " a defendant has the right to know the prosecution case to be answered and to rely on that". He, perhaps understandably, did not plainly submit that the jury is bound by the admission.

[11] In any event the relevant part of the agreed statement was in the following terms:[5]

> [6] The time stamp recorded on the CCTV footage is incorrect. The correct time is one hour later than the time shown on the footage.
>
> [7] In the time period between CCTV still photographs 72 and 73 in Crown **Exhibit 1**, the following can be observed on the CCTV footage:
>
> (a) At time stamp 01.13.19am Mr Wallace can be seen beginning to walk down the stairwell observed in photograph 72 towards the ground floor. He is not wearing any clothing. He goes into the library on the ground floor to retrieve his mobile phone.
>
> (b) At time stamp 01.14.S0am Mr Wallace can be seen beginning to walk from the ground floor back up the same stairwell. He is not wearing any clothing.
>
> [8] In the CCTV still photographs 73 to 76 in Crown **Exhibit 1**, the following can be observed:
>
> (a) At time stamps 01:31:44 and 01:31:47 Mr Wallace can be seen walking down the stairs to the mezzanine level and then opening the door that leads to that part of the house where the complainant's bedroom is. He is wearing black underpants.
>
> (b) At time stamps 01:46:57 and 01:47:02 Mr Wallace can be seen coming back through the door on the mezzanine level and going up the stairs towards his bedroom. He is wearing black underpants.

[12] This statement must be read in context. It is perfectly clear that the adjustment was about daylight saving. If the timestamp was idiosyncratic to the particular CCTV camera (that is, not GPS linked as modern mobile phones are), it might not have been accurate, even after adjusting for daylight saving. A reasonable jury, properly directed and having heard all of the evidence, was entitled to infer that, in context, "correct time" in [6] meant no more than that the CCTV timestamp did not take account of

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5 Emphasis original.

daylight saving, and so should be adjusted by one hour. It need not at all mean that as adjusted, the baseline timestamp was chronologically accurate.

[13] As we described in the leave decision, there was other circumstantial evidence to support an inference that the adjusted time was still incorrect.[6] Such inference, if that was in fact what the jury inferred, would not have been mere speculation.

[14] Thus, the true issue in relation to timing was as to the meaning and effect of [6] of the agreed statement, not s 9(2) and (3). This gives rise to no question of general importance and there is, in any event no risk of miscarriage.[7] It follows that there is no very special reason to recall our leave judgment.

Result

[15] The application for recall is dismissed.

Solicitors:
Doug Cowan, Barristers and Solicitor, Auckland for Applicant
Crown Law Office, Wellington for Respondent

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6 SC leave judgment, above n 1, at [11].
7 Senior Courts Act, s 74.