

**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 O AOTEAROA**

**SC 24/2023  
[2023] NZSC 86**

BETWEEN	S (SC 24/2023) Applicant
AND	ATTORNEY-GENERAL First Respondent
AND	DISTRICT COURT AT AUCKLAND Second Respondent

Court: Glazebrook, Williams and Kós JJ

Counsel: Applicant in person  
Z R Hamill and W P So for First Respondent  
H M Carrad for Second Respondent

Judgment: 18 July 2023

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**JUDGMENT OF THE COURT**

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**A The application for leave to appeal is dismissed.**

**B There is no order as to costs.**

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**REASONS**

**Introduction**

[1] The applicant was convicted in 2010 on seven charges of serious sexual offending. He was sentenced to 16 years' imprisonment with an MPI of 10 years.<sup>1</sup> He

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<sup>1</sup> *R v [S]* DC Auckland CRI-2008-090-003508, 18 May 2010.

has since brought a series of appeals and habeas corpus applications as either direct or collateral attacks on his convictions.

[2] The judicial review proceeding the subject of the current application commenced in the High Court in May 2022, with the applicant challenging the District Court Judge's (pre-Criminal Procedure Act 2011) decision to commit the applicant for trial.<sup>2</sup> On application by the Attorney-General, the High Court struck out the applicant's proceedings as an abuse of process.<sup>3</sup> The High Court dismissed the applicant's parallel application for interim orders asking for (effectively) bail pending the determination of the judicial review proceedings.<sup>4</sup>

[3] The applicant now applies directly to this Court for leave to appeal against the High Court decisions described above.

### **High Court judgment — 2022 judicial review proceedings**

[4] In the 2022 judicial review proceedings, the applicant argued that the deposition Judge erred in committing him to trial, as the Judge admitted the complainant's EVI, which was not made on oath or affirmation. As a result, he argued, all that followed was invalid, and his conviction should be set aside.

[5] Powell J, after traversing the history of the applicant's challenges, held that multiple challenges to pre-trial matters had been considered from 2015. The committal argument in particular had been considered by this Court twice in dismissing both recall applications. It was "not tenable" to say that this Court's judgments ignored the applicant's challenge to the procedures adopted at committal.<sup>5</sup>

[6] In any event, the High Court found that the argument was misconceived. The nature of the committal process was that, absent any challenge to the committal

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<sup>2</sup> He also raised other arguments in the High Court which are not raised in this application so will not be covered.

<sup>3</sup> *S v The Attorney-General* [2022] NZHC 2992 (Powell J) [HC judgment].

<sup>4</sup> At [28]. The applicant's application for recall of the HC judgment was dismissed: *S v The Attorney-General* [2023] NZHC 371.

<sup>5</sup> HC judgment, above n 3, at [24].

decision prior to the trial, there was “simply no legal basis to suggest the result of the trial would be invalidated by any defects in the committal process”.<sup>6</sup>

[7] Finally, the applicant’s issue with the committal decision did not change the fact that: (1) had the Judge declined to allow the interview to be relied upon, the Summary Proceedings Amendment Act 2008 would have allowed the charges to be re-laid and the evidence to be relied upon; and (2) the complainant gave her evidence on oath before giving evidence at trial, and that was the evidence upon which the applicant was convicted.<sup>7</sup> The outcome of the trial would not have been affected.

### **Applicant’s submissions**

[8] In this Court the applicant continues to challenge the committal decision, arguing:

- (a) The deposition Judge erred in relying on the complainant’s unsworn EVI. This was a fundamental defect which means the decision to commit the applicant to trial cannot stand.
- (b) The prosecutor breached the applicant’s right to natural justice under the New Zealand Bill of Rights Act 1990 by advocating for the use of the EVI in committing him to trial. The prosecutor is also liable in tort for false imprisonment arising from the conviction.

[9] The applicant submits that the High Court erred in finding that he was attempting to relitigate matters, as this Court has not considered the committal issue. He argues his application directly to this Court reflects the need to determine whether this Court has in fact addressed the committal issue already.

[10] He states that these are issues which are of public importance and would result in a miscarriage of justice if not addressed by this Court.<sup>8</sup>

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<sup>6</sup> At [25].

<sup>7</sup> At [26].

<sup>8</sup> Senior Courts Act 2016, s 74(2)(a) and (b).

## **Respondents' submissions**

[11] The first respondent supports the High Court decision. It says that the s 74 Senior Courts Act 2016 criteria has not been met, nor are there any exceptional circumstances to justify leave being granted. The applicant is attempting to relitigate matters which have already been addressed by this Court.

[12] The second respondent abides the decision of the Court.

## **Analysis**

[13] An applicant for leave to appeal directly to this Court must satisfy the Court that it is not only necessary in the interests of justice for this Court to hear and determine the appeal, but that the circumstances of the case are so exceptional as to warrant the bringing of a direct appeal.<sup>9</sup>

[14] The applicant has identified no exceptional circumstances in this case. Nor, given that his core complaint has been twice considered and rejected by this Court, has he established that it is necessary in the interests of justice to hear and determine his proposed appeal.

[15] The application for leave to appeal is dismissed.

[16] The first respondent did not seek an award of costs. As this matter is essentially related to criminal proceedings, there will be no award as to costs.

Solicitors:  
Crown Law Office, Wellington for Respondents

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<sup>9</sup> Senior Courts Act, s 75.