IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 76/2019
[2020] NZSC Trans 3

CECILIA VICTORIA UHRLE
Applicant

v

THE QUEEN
Respondent

Hearing:	18 February 2020
Coram:	Winkelmann CJ William Young J Glazebrook J O'Regan J Ellen France J
Appearances:	G N E Bradford and S D Withers for the Applicant C A Brook for the Respondent R S Reed QC as Counsel to assist the Court

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JURISDICTION HEARING

MR BRADFORD:

Good morning, may it please the Court. Bradford and Mr Withers for the applicant.

WINKELMANN CJ:

Tēnā korua Mr Bradford.

MS BROOK:

Tēnā koutou, e ngā Kaiwhakawā, ko Ms Brook ahau e tū nei mō te Karauna.

WINKELMANN CJ:

Tēnā koe Ms Brook.

MS REED:

May it please the Court. Ms Reed as counsel assisting.

WINKELMANN CJ:

Tēnā koe Ms Reed. Mr Bradford?

MR BRADFORD:

Thank you. I refer to my submissions for Ms Uhrle in respect of the jurisdiction to hear this appeal dated 31 October last year and I don't put those, going through them. In particular I'd rather, perhaps deal with the three propositions that this honourable Court wanted input from counsel on and those were whether the Court had jurisdiction to entertain a second application for leave when one has already been dismissed. Second, whether a direct appeal from the High Court is available and thirdly, whether the Court of Appeal was correct to treat the application as an application to recall as opposed to an application for a second appeal.

Turning to each of those issues. Firstly, whether the Court has jurisdiction to entertain a second appeal for leave when one has already been determined. Counsel were responsibly discussing matters before the Court convened and it appears the common theme is that it's terminology which, that's been used

for the various cases, and even in the Court of Appeal by counsel and there was various descriptions of how, whether it was an application for recall, whether it was another appeal or whatever, but the jurisdiction, I answered the proposition in the affirmative and say that in terms of *Saxmere Company Limited v Wool Board Disestablishment Company Limited* [2008] NZSC 94, (2008) 19 PRNZ 132, and *R v Smith* [2003] 3 NZLR 617 (CA) there is jurisdiction to, for Courts in this country to recall a perfected judgment. *Saxmere* obviously was civil, and I disagree with my learned friend for the Crown where she seems to place more importance on it being civil. In my respectful submission it matters neither whether it's –

WINKELMANN CJ:
Wouldn't you argue it rather favours your argument that it's criminal rather than civil, given the issues that you claim?

MR BRADFORD:
I'm sorry?

WINKELMANN CJ:
Wouldn't you argue it favours you rather than against you that it's a criminal matter?

MR BRADFORD:
Well that's where I find myself. But in that, for instance in *Saxmere*, even if those facts in *Saxmere* had been found in a criminal case, I respectfully suggest you would have had the same outcome. It would've, that judgment would have been recalled or set aside on the basis that – the third category perhaps of *Saxmere* where for some other very special reason justice requires that the judgment be recalled, and I'd note that the Crown position is that all three criteria in *Smith* need to be satisfied.

WINKELMANN CJ:
Yes, I mean *Saxmere* is a conventional statement in all the recall tests isn't it?

MR BRADFORD:

It is, it is, and for myself, perhaps as I started my submissions, it's a matter of terminology and what you call it, but it's – so my submission basically is that, yes, this Court does have jurisdiction to entertain a matter when appeal rights have been exhausted. Now whether that's a second appeal or a recall, and I think you may hear from the Crown that perhaps it should be dealt with on the basis of recall of the original leave application. We're probably not that far away from the Crown on that basis.

WINKELMANN CJ:

What's your position?

MR BRADFORD:

Well the Crown's position, and my learned friend will correct me if I'm wrong, seems to be that we're dealing with a leave application that's been determined, and if facts subsequently arise then it's a recall of that leave application that that's the gravamen of why everyone is there so I don't really think there's much difference between the applicant's position and the Crown on that basis. So yes I –

GLAZEBROOK J:

Are you really saying the terminology doesn't matter. There is an ability whether it's to hear a second application or to recall the first in circumstances like *Saxmere* and that was set out in *Smith*, there is the ability to entertain the – whatever terminology is used, is that the submission?

MR BRADFORD:

It is but I do think that the issue of terminology comes about because of the lacuna in the legislation. Once your appeal rights are exhausted there, there's no mention of inherent jurisdiction or anything like that, or the *Saxmere* principles or *Smith* principles. You're either, it's been here for appeal, you're done, and – so perhaps that explains why the terminology varies, and it was noticeable in the Court of Appeal that, different counsel using different

terminology. At the end of the day it's what's has happened that's probably more focused to the Court.

Turning to the second proposition that the Court wants some feedback on, was whether appeal direct from the High Court is available. I've answered –

WINKELMANN CJ:
Just before you move on, just to be clear, do you say, you said the Crown's position is that all of the three conditions in *Smith* must apply. What do you say about that?

MR BRADFORD:
I disagree.

WINKELMANN CJ:
And you say?

MR BRADFORD:
I would hang my hat on the third category of *Saxmere* where for some other very special reason justice requires a court to step in and do what's expected of a court of justice. That's where I would – I would land on that destination and *Smith* needs to be considered in terms of the circumstances in which it was, that judgment was delivered, and that related to procedural aspects as Your Worships will know, the Court will know. Procedural aspects around leave to appeal to the Privy Council and the methods that were being adopted in those days were corrected in *Smith* and the Court accepted basically that, the Crown submission that there had to be a fundamental error in procedure, which there was, there's no doubt about that, and the other two criteria in *Smith*, and there was no alternative remedies so…

GLAZEBROOK J:
So you see *Smith* as a subset of the third category of *Saxmere*?

MR BRADFORD:

Yes I do and, because, and I filed some supplementary submissions which I annexed a report from the *New York Times* about Mr Archie Williams who, he would never have come within the criteria in *Smith* if that was the test because –

WINKELMANN CJ:

You'll note I imagine you'd note that in *Smith* the Court actually drew on the civil recall jurisprudence when formulating its test.

MR BRADFORD:

I would accept that, and perhaps that is illustrative that there's not much difference between the criminal and the civil recall. It's what factual scenario pricks the Court's conscience sufficiently to engage and correct that which needs to be corrected, and so terminology is part and parcel of it but it's the factual matrix that comes back. Well the reason for the revisiting it after it's been finally determined, that should be the focus, in my respectful submission, and perhaps one of the reasons the legislation doesn't, it provides appeal rights but it doesn't, and it can't, specify every, all the circumstances in which human behaviour can come before this Court, which Your Honours will all be aware is wide and varied, and in those situations in my submission that's probably what it is, that's where the inherent jurisdiction of this honourable Court comes into play because that's what we've got Judges for, to identify these sorts of things and do something about it, if the Court was sufficiently minded. So you can never legislate the number of incidences of human behaviour, that would warrant a recall, so we as a society entrust our learned Judges to deal with these issues.

Is that appropriate to move to the second point at this stage?

WINKELMANN CJ:

Yes.

MR BRADFORD:

Thank you. The second issue that this honourable Court wanted input on was whether a direct appeal to the High Court is available and I'd answer that in the negative. I would say, well my submission would be that the High Court would be functus officio and thereafter you after employ or engage your statutory appeal rights, and I had a useful discussion with my learned friend Ms Reed QC who I did offer for her to sit where I am but she suggested I don't, but a useful discussion with Ms Reed about the High Court and the issue of functus officio, and we talked about what if a verdict or a judgment was obtained by fraud subsequently discovered after a perfected judgment.

WILLIAM YOUNG J:

So are you saying that despite an appeal against conviction having been dismissed by the Court of Appeal, you can go back to the High Court decision and come here?

MR BRADFORD:

No, no Sir. No, I'm not saying that.

WILLIAM YOUNG J:

Okay, do we need to go down this line then?

MR BRADFORD:

No, no, not at all, but I just answer that proposition in the negative. I'd say the High Court's functus officio. So on that basis I'd move to the third issue this honourable Court wanted submissions on, and that was whether the Court of Appeal was correct to treat the application as an application for recall as opposed to an application for leave for a second appeal. I don't quarrel with how the Court of Appeal got to where they got to, and I suppose it comes back to Justice Glazebrook's comment about terminology and that perhaps an example of it, whether it's an application for recall or a second appeal. So I would submit that if it's either of the two it would be the recall, it's an application for recall as opposed to a second appeal because Ms Uhrle had exhausted all her appeal rights by that stage.

There's suggestion that section 406, the Governor-General's prerogative, is a safety net of sorts, and I respectfully concur with my learned friend Ms Reed's submission that section 406 issues shouldn't come into play in respect of the matters before this honourable Court today. It's an entirely separate, and it would appear that the criminal cases review jurisdiction commencing in June or July this year may be an added safety net, and in fact that's how Mr Archie Williams in the state of New York, it's appeal was considered by the Innocence Project over there so…

And I do adopt, at 4.4 of my submissions dated 31 October, the Court of Appeal comment at paragraph 14, "The law cannot be without recourse to the innocent wrongly convicted," and I know we're not talking about this today, we're talking about leave not the merits of an appeal, and they say, "in most cases recourse is likely to be limited to two routes: application for leave to appeal to the second or apex appeal court… or applications for the prerogative of mercy." And my submission is that Ms Uhrle's matter is being advanced today on the basis of an application for leave to appeal to the apex court, and…

ELLEN FRANCE J:

Mr Bradford, in terms of the terminology, cases like *De Mey* would say that if it's a recall there isn't then jurisdiction for this Court to hear an appeal from the decision declining recall. So what do you say about that.

MR BRADFORD:

Well I would imagine counsel would be knocking on the door of the Court of Appeal and perhaps be met with the comment I just cited to the Court about recourse to the apex court. So does that answer that?

GLAZEBROOK J:

So when you say "recourse to the apex court" what do you mean in those circumstances?

MR BRADFORD:

Well those are the Court of Appeal's words, and I'd imagine they meet this Court.

WINKELMANN CJ:

Did you say that your application is advanced today as an application to leave to appeal the recall judgment? Is that what you're saying? Because I think that's what you're being asked about. Because that's contrary to what you said earlier which is that it's, you said that you were suggesting that be dealt with as an application to recall.

WILLIAM YOUNG J:

Well isn't it either an application for leave to appeal for a second time against the first Court of Appeal judgment, or an application for recall of our decision not to grant leave?

MR BRADFORD:

Correct.

WINKELMANN CJ:

Yes, and you're happy to rest it on that?

MR BRADFORD:

Yes I am. Thank you. Can I assist the Court further?

WINKELMANN CJ:

Thank you Mr Bradford. Ms Brook?

MS BROOK:

May it please the Court. Having heard perhaps that last exchange I think where we might have got to is that there's really only one live issue remaining, which is whether or not the law permits successive applications for leave, or successive first appeals, if we're talking about the Court of Appeal. It sounds like we're –

WINKELMANN CJ:

Well I think there might be two live issues remaining which the first is that issue, and the second is the extent of the recall jurisdiction.

MS BROOK:

Yes, I suppose I –

WILLIAM YOUNG J:

Sorry, whose recall? Our recall or the Court of Appeal recall?

WINKELMANN CJ:

Well I think –

GLAZEBROOK J:

Our recall.

WINKELMANN CJ:

Our recall, yes.

MS BROOK:

In my submission that's really subsumed in the question of whether or not there is a jurisdiction for successive leave applications because –

WILLIAM YOUNG J:

Whether we can now grant leave to appeal either on a second application or by way recall of the earlier leave decision to appeal against the first Court of Appeal decision.

MS BROOK:

Yes. Where I was getting to is I don't think we are any longer arguing about whether there is jurisdiction to appeal against the latest Court of Appeal decision, that seems to now be not pursued, and it appears everybody agrees that a direct appeal from the High Court is not available, which was the other issue that had been raised, so I don't propose –

ELLEN FRANCE J:

Well that's assuming that the Court of Appeal is correct to treat it as a recall.

MS BROOK:

Well I don't see, because Ms Uhrle has already had a first appeal to the Court of Appeal, even if she'd never applied for a recall, even if she was coming to this Court for the first time, I don't see that the option of a direct appeal from the High Court would have been available.

ELLEN FRANCE J:

Right, no I understand.

MS BROOK:

It would have been available right at the time she was convicted, if she'd chosen to pursue that instead of the Court of Appeal, but that wasn't the option that was pursued.

So the Crown submission really is that terminology does matter and that the distinction between recall and successive applications or appeals is a distinction with a difference. In my submission recall is about cases where something has gone wrong with the original decision on appeal. Successive applications for leave to appeal, or successive appeals, don't assert that anything has gone wrong with the previous decision. They are fresh applications or appeals brought on new grounds. Certainly in this case and others that have been considered, and of course there's no dispute, I don't think, between any of the parties that there is recall jurisdiction. The Court does have inherent jurisdiction to revisit its decisions in prescribed circumstances, but the Crown says there is no jurisdiction for successive first appeals or successive applications for leave to appeal to this Court.

WILLIAM YOUNG J:

This is a Crimes Act appeal, isn't it?

MS BROOK:

This is, yes, but there's no material difference between –

WILLIAM YOUNG J:

Well was there anything in the old regime that corresponded to the section, which said an application for leave, resolution of an application of leave to appeal is final?

MS BROOK:

No I don't think so, but I agree with my learned friend Ms Reed QC as Amicus that that's not actually helpful. It superficially appears to be helpful –

WILLIAM YOUNG J:

What's the section, sorry, I forgot?

ELLEN FRANCE J:

It's 213.

MS BROOK:

Yes, it's 213 of the Criminal Procedure Act 2011. It appears superficially helpful to the Crown in support of the submission that I'm making, but I agree that that's about the appealability of leave decisions.

WILLIAM YOUNG J:

But how could an appeal decision of this Court be appealable?

MS BROOK:

Well, no, the Court of Appeal has a leave jurisdiction as well.

WILLIAM YOUNG J:

Yes but "an appeal court". It didn't just say a decision of the Court of Appeal to give or refuse leave is final?

MS BROOK:

I'll just check the –

WILLIAM YOUNG J:

It's 213(3). I would agree with what you are saying unhesitatingly if it said "decision of the High Court or Court of Appeal."

MS BROOK:

So section 213(3) must relate in practice only to leave decisions of the High Court or Court of Appeal.

WILLIAM YOUNG J:

Why?

MS BROOK:

Obviously a leave decision of the Supreme Court can't be appealed because there's nowhere further to go.

WILLIAM YOUNG J:

Yes, so does it perhaps suggest it means something different?

MS BROOK:

I'm sorry?

WILLIAM YOUNG J:

Perhaps that means, it suggests it means something different?

MS BROOK:

Well that would be helpful to the Crown, I suppose, if that's the case.

WILLIAM YOUNG J:

Yes, although not in this case because the section doesn't apply to this case.

MS BROOK:

That's right.

ELLEN FRANCE J:

But “appeal court” is defined as meaning, “A first appeal court, second appeal court, or other appeal court specified by this Part,” so that does seem to encompass this Court. In 212.

GLAZEBROOK J:

Well if that was the case, and it’s interpreted as meaning that it’s totally final with no ability to recall, that would actually be quite odd, I would have thought. If say for instance you find a true *Saxmere* case where the Judge’s nephew was the complainant, and a leave to appeal was refused. I mean a true bias case, it would be somewhat odd. I suppose you could say, well, it was a nullity, but we’ve not been very keen on that sort of terminology in a…

MS BROOK:

Well I would suggest that at its highest section 213(3) would only provide that you can't bring successive applications for leave to appeal. I think it would be a long bow to draw to say that it actually displaces the inherent jurisdiction of the Court to recall or revisit –

WILLIAM YOUNG J:

I think even I would probably agree with you on that.

MS BROOK:

Because in the *Saxmere* circumstance, if we just take the facts of *Saxmere*, in my submission that would properly be an appropriate case for recall. Where, in fact, you’ve discovered that the Court who heard the original decision was not properly constituted because it was not impartial.

WILLIAM YOUNG J:

The judgment we’ve been given is actually the substantive judgment in *Saxmere*, isn't it? The recall of the earlier substantive judgment, not the..

MS BROOK:

No, there's, the recall decision is in the bundle that Ms Reed prepared I believe.

WILLIAM YOUNG J:

Is it? I'm sorry I might have had one that was given to me loosely.

MS BROOK:

It's very short. It's only two pages long. It's at page 139 of the bundle that Ms Reed prepared.

WILLIAM YOUNG J:

Page 139.

MS BROOK:

So before leaving the section 213(3) point I suppose the most that I can say is that the Crown is not advocating for that to be as final as it could possibly be interpreted to be.

GLAZEBROOK J:

Well you say it doesn't stop the recall jurisdiction but it does stop successive applications, and you make a distinction between recall as something went wrong, and successive appeals. I just perhaps wanted you to address the third category in *Saxmere* then. Is that as long as the special reason has to do with the earlier appeal? Because I don't think it's as narrow as you're suggesting in the civil jurisdiction, is it?

MS BROOK:

No I don't think it is, there –

GLAZEBROOK J:

So why would –

MS BROOK:

– is a distinction.

GLAZEBROOK J:

Why would it be so narrow in the criminal jurisdiction is probably – so what Mr Bradford has said is that some new evidence point comes within, potentially comes within the special reason in *Saxmere*.

MS BROOK:

Yes. Perhaps if I can address the significance of the civil and criminal jurisdictions, because that's, in fact, I think the premise of the argument that both my learned friends make is that, to put it bluntly, there's nothing prohibiting successive leave applications in either of the statutes, either the Supreme Court Act 2003, which still technically applies here –

GLAZEBROOK J:

Well if you look at it, sorry to interrupt, but we've already, you've already said there can't be successive leave applications, so what we're talking about is a recall at the moment. That's your submission?

MS BROOK:

Yes. So in the criminal jurisdiction the test is in *Smith*, and there are –

GLAZEBROOK J:

But why is the *Smith* jurisdiction – why, sorry, why does *Smith* apply in the criminal sphere rather than *Saxmere*? That's the first question.

MS BROOK:

Well the source of appellate jurisdiction in the civil and criminal jurisdictions is undoubtedly different. Under both the Supreme Court Act and the Senior Courts Act 2016 in the civil jurisdiction, any decision of the Court of Appeal can be appealed unless the law says you can't and –

GLAZEBROOK J:

Except we're talking about recall of an application for leave to appeal, aren't we, at the moment?

MS BROOK:

Yes but we, at its heart we're talking about exceptions to finality and so first I'm just wanting to set the context for why finality is viewed differently in the criminal jurisdiction and the civil.

GLAZEBROOK J:

I understand.

MS BROOK:

So the civil jurisdiction is essentially all appeals can be brought unless the law says that you can't, and that's in sections I think it's 78 of the Senior Courts Act and section 10 of the Supreme Court Act, but in the criminal jurisdiction those Acts provide that this Court only has jurisdiction over appeals that are authorised by the Crimes Act or Criminal Procedure Act as applicable. So there's some exceptions to that principle of finality. Obviously we have some statutory exceptions, which I'll come to, and then we have the Court's inherent jurisdiction in which there are three exceptions to finality which the Court of Appeal described in the judgment under appeal in this case. First there's the ability obviously to recognise that a decision may be a nullity. That's separate from recall. Secondly, where there's been some accidental slip or omission which the Court wishes to correct, and I don't think there's any dispute about that. Then there's the recall jurisdiction as encapsulated by *Smith*.

GLAZEBROOK J:

I just don't quite understand why *Smith* comes in here rather than *Saxmere*, in a recall sense.

MS BROOK:

Well the Crown submission is that the principles for recall may well be different between the civil and criminal jurisdictions. *Smith* is criminal –

WINKELMANN CJ:

Can I just test you on that, because if you look at *Smith*, *Smith* doesn't make the point you're making, and it draws clearly on the civil jurisdiction in describing the recall jurisdiction.

GLAZEBROOK J:

And what's say we'd had a case in our Court and we'd heard an appeal in a criminal case, and we'd had an application for recall of that on a *Saxmere* ground.

MS BROOK:

Well the Crown says –

GLAZEBROOK J:

Well we're not going to say it's a *Smith* ground, are we?

MS BROOK:

Well you could either say that it's a *Smith* ground, and I think it would fit into the *Smith* jurisdiction, being a fundamental procedural irregularity in that the appeal court was not aware that the Court below was not properly constituted, but alternatively you could describe it as a nullity.

GLAZEBROOK J:

I'm talking about our, we've heard an appeal, a second appeal, and we're exercising our recall jurisdiction. Are you suggesting that we can only do so on *Smith* grounds, and if so why would that be the case, rather than on *Saxmere* grounds?

MS BROOK:

Well in my submission the facts of *Saxmere* would fit into the *Smith* grounds. I'm not suggesting that if you were dealing with *Saxmere* now that you couldn't recall that decision.

WINKELMANN CJ:

Well I mean *Saxmere* is just drawing on all the old recall jurisprudence and that's all we, retained a special circumstance so the Court's always said we won't tabulate completely because this is a court of justice, so we don't tabulate completely. We always keep this third category where we can act if justice so requires.

MS BROOK:

Well the question is whether that supersedes the test in *Smith* for the criminal jurisdiction.

WINKELMANN CJ:

Well I mean –

MS BROOK:

Because the Crown would say that the jurisdiction should be more circumscribed in the criminal jurisdiction than in the civil, given the importance of finality to victims and the parties, and the availability of section 406.

GLAZEBROOK J:

So somebody should stay in jail because of the importance of finality. There are other aspects involved in this, aren't there?

MS BROOK:

Not at all Ma'am. My point is that if you're in that situation there is a procedure for dealing with it. There are statutory exceptions to the principles of finality in the criminal jurisdiction, which are not present in the civil jurisdiction. So firstly, and there's obviously section 406 of the Crimes Act, which is available to convicted persons who wish to bring an appeal which would otherwise be considered to have been finally determined. Then the Crown as well has rights to reopen matters that might otherwise be consider to be final under the Criminal Procedure Act in sections 151 and 155, which deal with tainted acquittals and new and compelling evidence. So the Crown submission is that if you're in the situation where it appears that there might

have been, well that there's compelling grounds of appeal that were not raised previously, so it's a successive appeal, or a successive application for leave to appeal rather than a recall, then the appropriate procedure is to apply for the prerogative of mercy under section 406 of the Crimes Act.

Now on section 406, I just want to be really clear about what the Crown is saying about that, it's not suggested that the section 406 procedure supplants a statutory appeal right. Of course, it doesn't. I agree completely with Ms Reed's submission that section 406 can't operate to foreclose legitimately available appeal pathways where those are statutorily conferred. The issue is that the right of appeal needs to be legitimately available and conferred by statute and here that's just not the case.

WINKELMANN CJ:
Well wouldn't that, isn't the point you're making in relation to this alternative route being available, capable of being accommodated within the conventional test for recall because it simply means that there isn't an exceptional circumstance. So the availability of this alternative remedy might in some cases mean that there isn't an exceptional circumstance, yet in others it might not, but it's simply a fact to be weighed?

MS BROOK:
Yes, I think if we didn't have section 406 as a mechanism then there would be much more compelling reasons for this Court to consider successive leave applications, because there'd be no other way to bring a potential miscarriage of justice back before the Court.

WINKELMANN CJ:
But there are two routes to get to that. One route is to say *Smith* is a different test because it's a criminal jurisdiction and the Court decidedly made the decision to set a different test, and I'm just asking you to show us where in *Smith* that's said because I've read it and I didn't see the Court saying that. Or the alternative is to say well look it's just the same test, but obviously when you come to apply it in a criminal context it applies differently because we

have these other considerations as to what is in the interest of justice when you have alternative pathways available to you.

MS BROOK:

Yes, I think it's the latter. So the availability of section 406 isn't determinative because of course this Court, and the Court of Appeal indeed, have considered fresh evidence in relation to appeals where that hasn't been raised in the Courts below. The point is that there will be cases where even though there is a right of appeal, the Court considers well this isn't the place to be hearing evidence for the first time that is in dispute. That is better suited to section 406. Now a number of leave decisions of this Court which have held that despite there being an obvious right of applying for leave, that leave should be refused because the particular challenge is better suited to an enquiry under section 406.

O'REGAN J:

But what if it's not disputed?

MS BROOK:

It's not disputed?

O'REGAN J:

Yes. I mean what if you do have a situation where there is new evidence which clearly exonerates someone, and the Crown doesn't dispute that, what should happen then? Would you still go through the whole section 406 process?

MS BROOK:

The section 406 process would probably be very expedient if it was a situation of the Crown not disputing the significance of the evidence. I don't think we've ever had a situation like that in New Zealand so it's difficult to say.

O'REGAN J:

Well it's usually pretty involved, isn't it, the section 406 process, and usually takes a long time?

MS BROOK:

Well that's certainly the common conception of it, but in fact it's not that uncommon. There have been three section 406 referrals back to the Court of Appeal in the last 12 months, one of them concerning a conviction of male assaults female. Now, yes, these things do take a while but the Court process is, with the greatest of respect, not exactly speedy on a number of occasions. I checked the database of extant appeals just this morning and we have a number of appeals that have still not been heard that were filed in 2016. It's a misnomer to say that –

WINKELMANN CJ:

Well that's not because of speed, that'll be because of particular procedural considerations.

MS BROOK:

They almost all involve fresh evidence, and so when fresh evidence is disputed, particularly when it's expert evidence, it can take a very long time to sort that out. So I'm not sure it's fair to say that that means if a section 406 procedure is fundamentally flawed, it's just that to get –

O'REGAN J:

No, I'm just saying that it's more suited to a situation where there needs to be investigation and, you know, obtaining of information and testing and so on. But if you face a case where there is evidence which is clear, is there any point in going to section 406? Wouldn't it be simpler for the Court to reopen it's, one court or other, and I'm not quite sure which one, but to just reopen the decision and say well it's now clear that there aren't grounds for the conviction and so we set it aside.

MS BROOK:

I'm sure the Crown would be prepared to do that, provided there was jurisdiction for it, and it may well be that you could shoehorn that into the *Smith* jurisdiction, depending –

GLAZEBROOK J:

Well why would you shoehorn rather than saying, as *Saxmere* does, if there's a special reason for reopening then the Courts will, and obviously when they decide whether there's a special reason they'll take into account the 406 procedure and what's the most suitable.

MS BROOK:

Well because Parliament, in the criminal jurisdiction appellate courts can only hear appeals that are authorised by, and those are the words –

GLAZEBROOK J:

What we're talking about is the ability to recall. So what we're talking about is the test for recall, and I still would like to know why the test for recall should be different in civil and criminal.

MS BROOK:

Well my submission is –

WINKELMANN CJ:

I think you conceded it shouldn't. It just applies differently, is that…

MS BROOK:

It applies differently, yes.

WINKELMANN CJ:

So I don't know, I was just trying to see if this case is referred to in any counsel submissions but I, you maybe familiar with it Ms Brook, it's not, *Taylor v Lawrence* [2002] 2 All ER 353 I think it was decided shortly before *Smith* and was drawn upon, but I'm just looking to see if I can find it in *Smith*.

But there the Court makes the point that it's not, it's best not to talk about it in terms of limits on the jurisdiction of the Court, rather it's how the jurisdiction should be exercised, which is why I think we've been testing you a little bit about whether *Smith* is actually a narrowing of the jurisdiction which seems, the Court of Appeal seems to have assumed it is, or whether it's simply how the jurisdiction is being exercised in that particular case because *Smith*, of course, was a procedural error.

MS BROOK:

Yes. It's difficult to deal with a hypothetical situation where it seems so obvious that a Court should reopen a decision, and the example that's been posited of new and compelling evidence that's not disputed by the Crown is not something that's ever happened before, and it's certainly not the situation that we're in now.

GLAZEBROOK J:

Well, actually, I've come across a number of cases where that is the case where, which has been on appeal, where the Crown has totally conceded that – so it's not inconceivable that it could happen after an appeal. Because there are those cases which are just so absolutely obvious and they come before the Court and the Crown quite properly brings them before the Court in those circumstances and says, well, this appeal has to be allowed.

MS BROOK:

Yes.

GLAZEBROOK J:

So it's not inconceivable that it could happen a bit later, but I mean my difficulty with saying it's applied differently, yes I would agree it's applied differently in the criminal situation, but what we're talking about is jurisdiction, and so if you – yes of course 406 is relevant, yes of course the other statutory context is relevant, but does that limit jurisdiction so that the third category of *Saxmere* is limited to *Smith*?

MS BROOK:

Well I –

GLAZEBROOK J:

And that's your submission, it seems, and that's what I'm having difficulty understanding.

MS BROOK:

Well my submission is that the exception should be more narrowly exercised, if I can put it that way, in a criminal jurisdiction, because Parliament –

GLAZEBROOK J:

Well I'd agree with that but it's whether that is a jurisdictional issue, or merely that it should be exercised, that any discretion to reopen or recall should be exercised more cautiously.

MS BROOK:

Well the Crown's primary submission is that it is one of jurisdiction because the way in which it is to be applied in a criminal jurisdiction is enunciated in *Smith*. But I take the point that –

WINKELMANN CJ:

So you're now going back, you're saying it is jurisdiction –

GLAZEBROOK J:

Yes.

MS BROOK:

But I take the point that there's another way of analysing it.

WINKELMANN CJ:

Can I just put this to you because I'm attracted to it, and I don't know if you're familiar with the case, but I am attracted to it, what Lord Woolf said in *Taylor v Lawrence*. He said "The need for an effective remedy in such a case," this is civil, "may justify this court in taking the exceptional course of

reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations," etc, etc. So the point they're making, that's not limiting it to some sort of procedural error which is affecting the judgment subject to the recall. It's putting it rather more broadly, and if you read the judgment the Court says it's important the Court ultimately retains this jurisdiction exceptionally exercised but to ensure it's not the author of injustice.

MS BROOK:

I take it that *Taylor v Lawrence* is a civil case?

WINKELMANN CJ:

It's a civil, yes, as I said, yes.

MS BROOK:

Yes, so the difference is that in respect of criminal matters Parliament has expressly foreseen and provided for the situation in which after all appeal rights have been spent, the matter needs to be reconsidered, and there are statutory provisions which permit that. So my submission for the Crown is that if there are to be other circumstances in which further appeals or applications for leave to appeal can or should be brought, that's a matter for Parliament.

GLAZEBROOK J:

But this is subject to what you say is a narrow recall jurisdiction which is only related to procedural errors?

MS BROOK:

Something going wrong with the original hearing, or the original decision, yes. And as I've said the facts of *Saxmere* would fit into that category in my submission. And to give a more recent example, there's a case *Reddy*, I think

it's just anonymised as *R*, recently in the Court of Appeal where a decision was recalled because it was subsequently discovered that something evidentially had not been put before the Court, or misinterpreted by the parties I think, and that wasn't really so much as a procedural error but the issue is that the Court of Appeal had proceeded on a mistaken factual basis because of the way that the, because the fresh evidence had not come to light, which –

GLAZEBROOK J:
Well I really have difficulty with that then, because that does bring in fresh evidence at that stage.

MS BROOK:
Well it's analogous to *Banks*.

GLAZEBROOK J:
It's analogous to what sorry?

MS BROOK:
Analogous to *Banks*.

ELLEN FRANCE J:
Well I was going to ask you about *Reddy* because the Court there says that if they'd had the evidence the Court of Appeal in that case said it might have tipped the balance in terms of the outcome of the appeal. But it is really going back a step, isn't it, because it's about the way the evidence was, in part at least, about the way the phone evidence was treated at trial, that's how you then get the non-disclosure in the Court, isn't it?

MS BROOK:
No, because there was expert evidence in the Court of Appeal.

ELLEN FRANCE J:
Yes, no, I understand that.

MS BROOK:

And so what happened, and I'm not going to get this technically right, and it probably doesn't really matter, but –

ELLEN FRANCE J:

Well I found I couldn't, it's hard to understand.

MS BROOK:

But the two experts had given their evidence about what the impact of turning the phone on at particular times was, and whether it pulled information down from the cloud and so on, and then after the appeal, when the decision came out and it was sent to the Crown expert he said, "Well that's not what I said, and that's not what the other guy said either. The Court's misinterpreted our evidence." Now it wasn't actually the Court, it was the counsel for the two parties had just misunderstood what the experts were actually saying, so the way in which it had been presented to the Court of Appeal was misleading, and that's, in my submission, properly viewed as coming within the *Smith* jurisdiction because the evidence didn't change. It wasn't new evidence on some new issue that had come up. It had been put before the Court in a misleading way, not intentionally of course by anyone, but simply it was a very complicated issue which the lawyers had not quite understood correctly.

ELLEN FRANCE J:

And do you see *Smail* is in the same category?

MS BROOK:

You'll have to remind me what the fresh evidence was in *Smail*?

ELLEN FRANCE J:

Smail is the one where the sentence was increased by the Court of Appeal on the Solicitor-General's appeal and then it became apparent subsequently that he pleaded guilty on the basis of a sentence indication.

MS BROOK:

That was different again though because it was a sentence appeal and then, of course, it became a conviction appeal, and he hadn't previously had a conviction appeal because he'd pleaded guilty. So that wasn't quite the same successive appeals because he'd never exercised his right of appeal against conviction. It was only in the context of the sentence appeal that it became clear he should be permitted to exercise, out of time, his right of appeal against conviction because he pleaded guilty on the basis of a sentence indication and the sentence had then been increased on the Crown appeal. So that's a slightly different issue I would suggest.

ELLEN FRANCE J:

You'd agree, though, that those cases, and I'm thinking of *Reddy*, *Banks* and *Smail*, have all moved away from the notion of Court error?

MS BROOK:

Yes.

ELLEN FRANCE J:

Which is what *Smith* is about. So there has been a shift, at least to that extent?

MS BROOK:

Yes, although it can all still be described properly, I would suggest, as a procedural error. Not necessarily by the Court. It maybe an error that has affected the Court's procedure made by the parties.

GLAZEBROOK J:

Well especially *Banks*, that could equally be dealt with by a 406, couldn't it?

MS BROOK:

It could have been but everybody agreed that, I think, well, the Crown didn't agree initially, but the Court determined that it was properly coming within the recall jurisdiction. The Crown submission certainly was that it didn't.

That's all that I had to say about the recall jurisdiction unless the Court has any further questions?

ELLEN FRANCE J:

Just one question, Ms Brook. I know it's a leave decision of the Court, but in *Suckling v R* [2016] NZSC 133, (2016) 27 NZTC 22-071 the Court does say, "These are not new matters of a sort that would justify the Court taking the unusual step of granting a second application for leave to appeal," so that does seem to envisage that possibility.

MS BROOK:

It does, relying on *Saxmere*.

ELLEN FRANCE J:

Yes.

MS BROOK:

I note that *Wickliffe* wasn't cited in *Suckling*, and of course it's a very brief leave decision.

ELLEN FRANCE J:

Yes.

MS BROOK:

And it appears to have essentially been presumed that there would be jurisdiction based on *Saxmere* for a second application for leave, and the Crown submission is simply that that's not correct. And of course there have been other leave decisions of this Court where it's been suggested that while leave was being refused on that application, that perhaps a future leave application could be made, very recently in a case called *Bunting*, and I think the parties have referred in this case to *Milner v R* [2015] NZSC 38, [2015] 27 CRNZ 412 as the other example, and the Crown submission, although it's never actually come to pass, that invitation hasn't been taken up by any of

those people yet, the Crown response on any successive leave application would be that there is no jurisdiction for one, and that the leave decision were incorrect in that respect.

WINKELMANN CJ:
We might just have to recall our earlier one then.

GLAZEBROOK J:
Yes, you can imagine that would be very unpalatable if somebody did come back and make a second application and we go sorry, there wasn't any jurisdiction, too bad, because we've – I mean court's being an instrument of injustice would really be an apt description of that, wouldn't it?

MS BROOK:
But if that's the case then that's what the Court would have to say.

GLAZEBROOK J:
Well I don't know that this Court as a final court would find that in the least bit attractive unless Parliament absolutely and explicitly told us so.

ELLEN FRANCE J:
The other question I wanted to ask, Ms Brook, was about the inter-relationship between the jurisdiction of the two courts, the Court of Appeal and this Court. So thinking about a case like *Wong* where this Court declined leave but said that Mr Wong could go back to the Court of Appeal and see if the *Smith* jurisdiction applied. How do you see that working in terms of the respective scope of the recall jurisdiction?

MS BROOK:
Well that does seem to make sense. That if a court, if a ground of appeal in an application for leave to appeal to this Court would actually form the basis of recall of the Court of Appeal's decision, that's the course that should be adopted first, and it better preserves appeal rights for that appellant as well, and of course that's not the only time it's happened. *McGeachin* is another

case where this Court directed Mr McGeachin actually you need to go back to the Court of Appeal and seek recall of that decision, and that was a similar *Banks*-type disclosure issue where something had come to light later that Mr McGeachin feels would affect the Court of Appeal's decision, and that hasn't actually been resolved yet in the Court of Appeal, but that, in my submission, is the appropriate way to deal with that situation.

WINKELMANN CJ:

If the refusal of leave is final, what does that do to the Court of Appeal's jurisdiction to recall because –

MS BROOK:

They don't need, there's no leave requirement anymore in the Court of Appeal. So that provision is not in play.

WILLIAM YOUNG J:

No, if a recall appeal here is refused, does that mean the Court of Appeal can't, has to treat its own decision as beyond challenge?

MS BROOK:

I'd have to check. I think in *McGeachin* he might have actually been, it might have been suggested to him that he abandon or withdraw his application so that he could bring it again –

GLAZEBROOK J:

In some cases we have certainly said that, not dealt with the application.

ELLEN FRANCE J:

That's not the case in *Wong*.

MS BROOK:

There's two outcomes. If you go back to the Court of Appeal on the *Wong* basis, either the Court of Appeal does recall its decision, and then you will have a different decision against which there will be presumably a fresh right

to apply with leave to this Court, to bring an appeal against that decision. I don't think the Crown would ever suggest that because before the recall you'd had an unsuccessful application for leave to appeal to this Court, that you couldn't then appeal against the new Court of Appeal decision.

ELLEN FRANCE J:
I mean Mr Reddy's in that category.

MS BROOK:
Yes.

ELLEN FRANCE J:
He has now applied for leave to appeal?

MS BROOK:
Yes, that's right. Does that answer your question? I'm not sure. The other alternative, of course, is that the Court of Appeal doesn't recall the original decision, in which case you've had your application for leave determined on the basis that it's not, doesn't meet the grounds for leave.

WINKELMANN CJ:
I'm just looking at where the Court in this case says Ms Uhrle's remedy is to go to the Supreme Court.

MR BRADFORD:
Paragraph 4.4 of my first submission.

WINKELMANN CJ:
Sorry, what paragraph?

MR BRADFORD:
Paragraph 4.4 of my first submission.

MS BROOK:

Yes, it's at paragraph 36 Ma'am where the Court says, "Ms Uhrle's position is on all fours with that of Mr Lyon," and then referring back to Mr Lyon at paragraph 34, the conclusion is that there hasn't been any fundamental error by the Court, by the Crown or anyone else that impeaches the process. Mr Lyon must renew his application for leave to appeal to the Supreme Court or make – "

GLAZEBROOK J:

Paragraph 34, renew an application, yes.

WINKELMANN CJ:

And do you say there's no ability to do so?

MS BROOK:

That's correct, yes. So the Court of Appeal did proceed on the basis that an apex court may never be functus and the Crown disagrees with that.

WINKELMANN CJ:

So you say that the only way that there is a pathway for Ms Uhrle is for a recall of the application to recall of this Court's original leave decision and that's, and it's outside the jurisdiction to do so?

MS BROOK:

Yes, so then her other, her statutory remedy is section 406.

WINKELMANN CJ:

Any questions? Thank you Ms Brook. Ms Reed?

WILLIAM YOUNG J:

Just in terms of where we are, I think it's pretty narrow issue.

MS REED QC:

It is indeed.

WILLIAM YOUNG J:

No leave, no jurisdiction to hear the appeal agianst the trial judgment. No jurisdiction to hear an appeal against the recall judgment. Is jurisdiction probably to grant a recall of the first leave judgment. Only outstanding issue is effectively that argument with his fingers crossed is there a jurisdiction to hear a second leave application.

MS REED QC:

Certainly my submissions start at the main principled ground that where this Court has brought before it a seeming miscarriage of justice, it can't be limited from acting to correct that miscarriage, even if it falls outside what might be referred to as the *Smith* criteria, and I do rely on the ground in *Saxmere* as a special reason as being an example of the wider jurisdiction that this Court might have available to hear such miscarriages and correct them, rather than to allow them to continue to be perpetrated in the hope that an alternative remedy under section 406 might apply. And my learned friend Ms Brook referred to *Milner*. *Milner* is a good example of the difficulty, in my submission, that might arise. It is within the casebook provided, and I wonder if I could take Your Honours through to that decision to illustrate the type of problem that maybe faced by, indeed, relying solely on the more limited *Smith* criteria. That's at page 122 of the casebook. Of course there is some overlap of that Court and this Court but indeed during the application for leave in that matter at paragraph 5 by minute of the Court counsel for both parties were asked how to address, how the Court should deal with the indicated further ground, which was based on doubt as to the cause of death, and didn't arise from the underlying appeal in the Court of Appeal. So counsel asked the Court unusually whether it should be dealt with as part of the leave application, or left to be advanced in a separate application to the Court of Appeal, or perhaps under the inherent grounds in *Smith*. This was an application and an issue that had arisen on the expert evidence, and very blatantly, so was in an unformed basis by the time it hit this Court in the context of the leave application that was already on foot.

It's dealt with more from paragraph 12 of that decision, the new doubts as to the acceptance of the cause of death. Now at that point counsel acting for Ms Milner accepted, this is at paragraph 13, that there was no procedural error or breach of natural justice which would justify recourse to the inherent power exercised in *Smith*, of course, in relation to the new evidence. So it was clear and on all fours that that new evidence of an expert nature would have fallen outside of the *Smith* criteria as they are currently set out. But under paragraph 14 it was clear that that new evidence was yet premature to be brought before the Court, so needed further work before it could do so.

The Court went on at paragraph 15 in the second sentence to say that, "If cogent evidence emerges from the further enquiries that have been suggested by the experts for the applicant, a properly constituted application for leave can be considered at that stage." Which will, of course, have been a successive application for leave because it was rejected in the course of this decision.

Now of course the Court also referenced the procedure in section 406 indicating that it may be better suited to the investigation that the experts indicate need to take place. But perhaps after the preliminary investigation the Crown expert did, in fact, concede that the expert evidence was appropriate and then cast doubt on the cause of death. If that were then the case, the argument pronounced by the Crown in this case would be that Ms Milner had no recourse to this Court and had to only rely on section 406 procedure to correct that error.

WILLIAM YOUNG J:
Or apply to recall the judgment on the basis it was founded on an error.

MS REED QC:
That's right, but we have an unnecessary procedural hoop to go through in a recall which is cast more narrowly in *Smith* than indeed this situation brings into play. Because on *Smith*, on the *Smith* criteria this position would not be

able to be dealt with. It would, as was agreed, fall outside of those criteria narrowly.

WILLIAM YOUNG J:
But if the Court had dismissed a leave application under the misapprehension that a further application could be brought, is it really arguable – is it really able to be seriously, could it be seriously argued that there wouldn't be an ability to recall that judgment?

MS REED QC:
Potentially not but there is –

WILLIAM YOUNG J:
Why?

MS REED QC:
– slways a direct issue to the problem, and that is to see that there is a special category of cases where the miscarriage –

WILLIAM YOUNG J:
Well in that case the Supreme Court would be, Milner's assertion would be right. I mean either it's right and there's no problem, or it's wrong and it's a problem solvable by recall.

MS REED QC:
Indeed. In my submission it's right and there's no difficulty, and that's why we have the indication in *Saxmere* that there are special reasons in the inherent jurisdiction, which must fall outside of those criteria in *Smith* to permit this type of issue to be dealt with by this Court as the apex court of the country. Such errors will and do occur and they are definitely wider, in my submission, than the type of issue that we see in *Smith*. And when we start talking about the *Smith* criteria being stretched to include issues such as disclosure issues that affect the breadth of the evidence that was available to counsel in the defence of a matter before the Court, that is a substantive issue, not simply a

procedural recall, and in my submission it should simply be categorised in the way that it is. As a special reason that affects the carriage of justice that needs to be corrected in special circumstances.

Now in pursuing that form of jurisdiction I am alive to the fact that the Criminal Cases Review Commission becomes online, as it were, from the 1st of July of this year.

WINKELMANN CJ:
Or the Act comes into force. Will it actually be operational at that time?

MS REED QC:
Yes, applications are received as of 1 July. So parts of the Act, as I understand, come into force prior to that time to permit the applications to be processed from 1 July of this year.

Now my friends have referred to the decision in *R v Gohil* [2018] 1 Cr App R 30, which is helpful, and of course that talks about the jurisdiction being subject to any other alternative remedies that are suitable, and of course the Court of Appeal in that case indicated that the Criminal Cases Review Commission was one such suitable alternative remedy where it related to issues of new evidence, and particularly expert evidence or matters such as disclosure which may have impacted upon the ability to defend a particular matter, and it maybe that from 1 July of this year the Court's ability, if it accepts it, to have a second, or successive application for leave under the *Saxmere* criteria, is limited again because of this alternative remedy that becomes available after 1 July would indeed ensure that there are few successive applications that would be before this Court. But as Your Honours have indicated in some of your responses to counsel, that's not a matter of jurisdiction, that is simply the discretion to exercise the jurisdiction in that case being declined because there are alternative remedies available. The jurisdiction itself still is available to the Court.

O'REGAN J:

Well I think the argument for the Crown is that the existence of that jurisdiction indicates that that's what Parliament intended should happen, rather than the Courts taking to themselves an inherent power to reopen earlier decision.

MS REED QC:

Indeed, but there is already an inherent power that has been recognised by this Court to recall matters to do with procedural errors, and –

WINKELMANN CJ:

I don't know if I'm being an old-fashioned lawyer here, but that argument seems to turn on *Smith*, treating *Smith* as meaning to – as being intended to narrow the scope of the jurisdiction (inaudible 11:07:15) on the basis that it's been somehow displaced by section 406. But when I read *Smith* I can see no such intent and I don't, Ms Brook might in reply correct me on this, if she has a reply, I'm not sure, I can see no such evidence. It simply seems to be an application of the civil recall jurisprudence and then there's one throwaway line which refers to procedural errors.

MS REED QC:

Indeed. It is possible to read *Smith* alongside *Saxmere* to permit the type of successive applications –

GLAZEBROOK J:

Well what it was really dealing with was whether you needed to go to the Privy Council, put a petition to the Privy Council rather than coming to the Court of Appeal, because that was actually the argument in *Smith*.

MS REED QC:

Indeed. I think the answer to the question is there must be something that the Court can do to correct something that is an obvious miscarriage in special circumstances, and that has been recognised by this Court already in a number of leave applications, for example *Saxmere*. *Smith* permits that too in certain circumstances and other matters such as *Milner*, Your Honours

have referred to *Reddy* indeed as well, have indicated that there might be that jurisdiction to do so and indeed I certainly support that position of the Court to fix those more substantive matters than simply just procedural nullities that impact on the way in which the judgment was reached. The issue then becomes whether that jurisdiction, if Your Honours accept that it exists, can be limited in a way to ensure that there's only a narrow category of cases to respect the principle of finality before the Court, so it is really exceptional indeed, and that maybe limited, as I have submitted, by the Criminal Cases Review Commission coming into force so that the times on which Your Honours exercise that discretion become more limited after 1 July.

I'm conscious of not taking up too much of Your Honours' time, this is an important issue that impacts upon jurisdiction, but much of the argument has narrowed to the current compass that we have before this Court, so I don't wish to address the other matters that are required, unless Your Honours have –

WINKELMANN CJ:
That we asked you. Yes, it does, it seemed to fall away, yes.

MS REED QC:
Yes. So unless there are any other issues that Your Honours wish me to address?

WINKELMANN CJ:
No, thank you Ms Reed. Now I think we'd normally just have reply from counsel for Ms Uhrle, but I just wonder, Ms Brook, did you have anything to say about that *Smith* point I raised?

MS BROOK:
I don't plan to take the matter any further than I already have, thank you Ma'am.

WINKELMANN CJ:

No, okay. Mr Bradford?

MR BRADFORD:

I can't really add to the discussion other than to respectfully adopt the President's comments from *Taylor v Lawrence* that clearly one has to establish a significant injustice and thereafter with no effective remedy and thereafter it's a matter for the Court to do what justice requires. So other than that I don't see a lot turning on whether it's civil or criminal. Civil litigants want finality as much as anyone for their balance sheets and in the criminal jurisdiction it's in society's interest that there be finality but it's also in society's interests that the Courts do step in as and when required and as I said earlier on, that's why we rely on Courts to do what Courts must do. So I can't add anything further.

WINKELMANN CJ:

Thank you Mr Bradford. Thank you counsel for your submissions on these issues. We'll take some time to consider and let you have the judgment in due course.

COURT ADJOURNS: 11.12 AM