NOTE: ORDERS PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS IN CA786/2016 PREVIOUSLY MADE IN COURT OF APPEAL AND IN DISTRICT COURT REMAIN IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA786/2018
[2019] NZCA 311

BETWEEN	ALISTAIR STUART LYON Applicant
AND	THE QUEEN Respondent

CA259/2018

BETWEEN	SHANNON BOYES-WARREN Applicant
AND	THE QUEEN Respondent

CA532/2018

BETWEEN	CECILIA VICTORIA UHRLE Applicant
AND	THE QUEEN Respondent

Hearing:	27 February 2019
Court:	Kós P, Brown and Williams JJ
Counsel:	J G Krebs and G C Gotlieb for Applicant Lyon C J Tennet and S J Fraser for Applicant Boyes-Warren G N E Bradford and S D Withers for Applicant Uhrle A Markham for Respondent
Judgment:	15 July 2019 at 11.00 am

JUDGMENT OF THE COURT

The applications for recall are declined.

REASONS OF THE COURT

(Given by Kós P)

[1] These are applications to "bring second appeals" in this Court. The issue they raise is in what circumstances this Court may revisit its own final decisions.

[2] As Ms Markham submitted (for the Crown) there has been a significant increase in applications for leave to bring a second or further appeal in this Court. Some applicants have made repeated applications, both to this Court and to the Supreme Court.[1] Decisions of this Court treat these variously as applications to "revisit" the original appeal, "reopen" or "recall" the original appeal, or to appeal "for a second time".[2] Some clarification is needed.

Background

[3] Mr Lyon has filed an application "to bring a second appeal". Mr Boyes-Warren has filed a notice of application for leave "to bring a second appeal (against sentence)". Ms Uhrle has filed a notice of appeal, which also may be treated as an application for leave to bring a "second appeal against conviction".

Mr Lyon

[4] Mr Lyon was convicted of multiple counts of drug and sexual offending in relation to five complainants. He was sentenced to 15 years' imprisonment with a minimum period of eight years.[3] His appeals against conviction and sentence were

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1 See, for example, *Wong v R* [2011] NZCA 563.

2 See, for example, *R (CA89/2018) v R* [2019] NZCA 176 ("reopen"); *Jones v R* [2019] NZCA 66 ("revisit"); *Banks v R* [2015] NZCA 182 ("recall"); and *Michaels v R* [2017] NZCA 254 ("for a second time").

3 *R v Lyon* DC Auckland CRI-2012-004-3519, 19 December 2014.

dismissed by this Court in June 2016.[4] Leave to appeal against conviction was declined by the Supreme Court on 29 September 2016.[5]

[5] The primary ground of appeal is that new evidence is available from two witnesses which "strikes directly at the veracity and credibility of the two complainants in the sexual violation counts". In addition, a point is taken that count 13 of the indictment was expressed as an alternative to count 12, and that count 12 having resulted in a guilty verdict, a verdict should not have been taken on count 13. It is said that the conviction on count 13 is, therefore, a nullity.

Mr Boyes-Warren

[6] Mr Boyes-Warren pleaded guilty to murder and assault with intent to rob a taxi driver. He was sentenced to life imprisonment with a minimum period of 15 and a half years.[6] His appeal against sentence was dismissed by this Court on 24 August 2010.[7] He did not seek leave to appeal to the Supreme Court.

[7] Mr Boyes-Warren was 16 at the time of his crime. Following his unsuccessful appeal against sentence, this Court delivered its judgment in *Churchward v R* dealing with the sentencing of young persons.[8] Mr Tennet submits that it was a "paradigm shift in sentencing" for young persons, and that Mr Boyes-Warren should be re-sentenced in accordance with it. Leave to bring a second appeal is sought in accordance with "the principles in *McMaster v R*".[9]

Ms Uhrle

[8] Ms Uhrle, along with three co-offenders, was found guilty of murder. She was sentenced to life imprisonment, with a minimum period of 13 years.[10] Her appeals

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4 *Lyon v R* [2016] NZCA 293.
5 *Lyon v R* [2016] NZSC 129.
6 *R v Boyes-Warren* HC Christchurch CRI-2008-009-19959, 10 March 2010 at [77].
7 *Boyes-Warren v R* [2010] NZCA 395.
8 *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446.
9 *McMaster v R* [2016] NZCA 612.
10 *R v Uhrle* [2013] NZHC 922.

against conviction and sentence were dismissed by this Court on 4 September 2015.[11] Leave to appeal was declined by the Supreme Court in June 2016.[12]

[9] Ms Uhrle's application is also based on what is said to be fresh evidence. In her case it is a confession by one of her co-offenders. He now asserts that he alone is guilty and fully responsible for the murder of Mr Lia.

Law

[10] Lord Atkin once observed that "[f]inality is a good thing, but justice is a better".[13] That is an appealing aphorism, but it is built on a false paradox. Finality itself is integral to justice, because justice is concerned with the determination of rights. Serial efforts to reopen otherwise final judgments may deny justice to parties and other persons entitled to depend upon them.[14] Lord Wilberforce said this in *The Ampthill Peerage*:[15]

> English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed on the right of citizens to open or to reopen disputes. … Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. ... For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved.

[11] Finality is a point of particular significance in the civil jurisdiction where, as Lord Dyson has noted extrajudicially, some unsuccessful litigants are prone to appeal decisions they think wrong and "go on appealing, as they would say, 'for as long as it takes'".[16] The High Court of Australia has observed that the principle of finality

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11 *Uhrle v R* [2015] NZCA 412.
12 *Uhrle v R* [2016] NZSC 64, (2016) 28 CRNZ 270.
13 *Ras Behari Lal v King-Emperor* (1933) 50 TLR 1 at 4.
14 As Lord Woolf CJ noted in *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528 at [54].
15 *The Ampthill Peerage* [1977] AC 547 (HL) at 569.
16 Lord Dyson "Time to call it a day: some reflections on finality and the law" (speech delivered at

"serves as the sharpest spur to all participants in the judicial process … to get it right the first time".[17]

[12] Finality is also important in the criminal context where the interests at stake are those of the community (represented by the Crown), the defendant and the complainant. Party status is less clear-cut in crime: complainants are not parties, but they depend very much on finality for closure and recovery.

[13] It is in each case a question of public confidence in the administration of justice. That confidence is impaired by both error (in particular, wrongful conviction) and indecision (such as undue delay or excessive recourse to appeal). Any jurisdictional rule controlling renewal of appeal comes down to a matter of balancing these two competing considerations.

[14] The law cannot be without recourse to the innocent wrongly convicted, whose rights are deservedly pre-eminent. But the recourse available to those who assert that status will seldom include the reopening of a spent appeal right. In most cases recourse is likely to be limited to two other routes: application for leave to appeal to the second or apex appeal court (in New Zealand, the Supreme Court from the Court of Appeal) or application for exercise of the prerogative of mercy. These limits are the natural consequence of the statutory scheme, to which we now turn.

Statutory scheme

[15] The appellate authority of the Court of Appeal is entirely statutory. Judicial review is a common law conception; its more robust half-brother, appeal, is the progeny of statute. Finality is written into our jurisdiction, in the criminal context, via the Criminal Procedure Act 2011. That Act is the source of this Court's jurisdiction and power to consider criminal appeals.[18]

Edinburgh University, 14 October 2011).

17 *Burrell v R* [2008] HCA 34, (2008) 238 CLR 218 at [16].

18 See Christopher Corns and Douglas Ewen *Criminal Appeals and Reviews in New Zealand* (Thomson Reuters, Wellington, 2019) at [7.5.4].

[16] Confining our attention to appeals from convictions and sentences entered in the High Court, ss 229 and 230 (conviction appeals) and ss 244 and 247 (sentence appeals) of the Act give a right of first appeal to this Court. Any further appeal however is not as of right, but rather by leave, and it is to the Supreme Court.[19] The Act does not confer two rights of appeal to this Court. It does not confer a right to bring a second appeal to us, even by leave. It does not give rights to exercise the first appeal by instalment, or to apply to renew an appeal that has already been determined. Once the Court of Appeal has delivered a final judgment, any further recourse offered by the Act is to the Supreme Court only.[20]

[17] In theory, more than one application for leave to appeal may be made to a second appellate court, although grant of leave on a renewed basis has been described as "unusual".[21] Leave may be granted, *inter alia*, if that court is satisfied that a (substantial) miscarriage of justice may have occurred, or may occur unless the appeal is heard.[22] That ground is particularly applicable to factual or evidence-based criminal appeals (or renewed appeals based on new evidence) which may not raise issues of general or public importance.[23]

[18] The alternative remedy open to a person whose appeal has been dismissed is to apply to the Governor-General for exercise of the prerogative of mercy. By s 406 of the Crimes Act 1961 on consideration of such an application the Governor-General may refer the conviction or sentence back to the Court of Appeal. In other jurisdictions this procedure has been reformed by the creation of a criminal cases review commission.[24] A Bill to establish such a commission in New Zealand has been introduced into Parliament and is presently before the Justice Committee.[25]

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19 Criminal Procedure Act 2011, ss 237 and 238. We deal here with appeals against conviction, but the same applies to appeals against sentence.

20 But subject to the three exceptions noted at [21]–[23] below.

21 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2008] NZSC 94, (2008) 19 PRNZ 132 at [1]; and *Suckling v R* [2016] NZSC 133, (2016) 27 NZTC 22-071 at [6].

22 Senior Courts Act 2016, s 74(2)(b) (appeals by leave to the Supreme Court). The word "substantial" is omitted for appeals by leave to the Court of Appeal: Criminal Procedure Act, ss 237(2)(b) and 253(3)(b), but it is a distinction without a difference: *McAllister v R* [2014] NZCA 175, [2014] 2 NZLR 764 at [34]–[35].

23 This forms a separate ground of appeal: Senior Courts Act, s 74(2)(a); and Criminal Procedure Act, ss 237(2)(a) and 253(3)(a).

24 For example, the Criminal Cases Review Commission in England and Wales.

25 Criminal Cases Review Commission Bill 2018 (106–1).

Exceptions to finality in the Court of Appeal

[19] To this statutory expression of finality, there are certain exceptions. We identify three in this judgment.

[20] In doing so we put to one side applications for leave to appeal where the appellant's rights have not in fact been finally determined — either because a right of appeal still lies in this Court or because that right, while extinguished temporally, may yet be revived. That was the situation in this Court's recent decision in *Taylor v R,* where the appellant made a belated application for leave to appeal out of time.[26] Another example is *R v Smail*, where a sentence had been increased in this Court on a Solicitor-General's appeal.[27] It then became apparent that the defendant had entered his guilty plea on the basis of a sentence indication within the original range. So a second appeal was permitted, though it was in fact a first appeal against conviction.[28]

[21] The first exception is where the decision of this Court on a first appeal is a nullity. This exception was noted in this Court's judgment in *R v Nakhla (No 2)*,[29] which relied on the observations of Lord Greene MR in *Craig v Kanssen:*[30]

> Those cases appear to me to establish that a person who is affected by an order which can properly be described as a nullity is entitled *ex debito justitiae* to have it set aside. So far as procedure is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order, and that it is not necessary to appeal from it.

In *Kanssen* judgment had been entered against a defendant who had never been served.[31] It may be observed that cases of apprehended bias by the Court are not usually analysed on the basis of nullity, but are corrected either on further appeal or (as in the House of Lords *Pinochet* decision) under the third exception noted below.[32] In the case of a nullity the inherent, demonstrative defect in the judgment means that

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26 *Taylor v R* [2018] NZCA 498, [2019] 2 NZLR 38.
27 *R v Smail* [2007] 1 NZLR 411 (CA).
28 *R v Smail* [2008] NZCA 6, [2008] 2 NZLR 448.
29 *R v Nakhla (No 2)* [1974] 1 NZLR 453 (CA) at 455.
30 *Craig v Kanssen* [1943] KB 256 (EWCA) at 262.
31 At 263.
32 *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 (HL); and *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76.

once that status is formally determined by a Court of competent jurisdiction, it is no judgment at all.[33] As a result the finality principle is not truly engaged.

[22] Secondly, there is the limited inherent (and now, statutory) power of this Court to recall a judgment to correct slips or omissions that do not alter the substance of the decision.[34] From 2005 this has been provided for expressly in the Court of Appeal (Criminal) Rules 2001.[35] The power is often used where some change must be made to protect confidentiality or where on reflection correction must be made to orders pronounced. It is seldom controversial and requires no further commentary in this judgment, for none of the applications before us engage this exception.

[23] Thirdly, there is the rather broader inherent power of this Court to recall a final decision in exceptional circumstances when required by the interests of justice. This is the inherent jurisdiction described in this Court's decision in *R v Smith*.[36] It is the jurisdiction invoked in each application before us. It requires some description by us therefore. The balance of this judgment addresses the third exception, in the context of appeals from the High Court.

Recall principles

[24] We make six points.

[25] First, while (as we noted earlier) a variety of expressions have been used to describe what the Court is doing, we think the correct description is that the Court is *recalling* its judgment if relying on this jurisdiction. It is certainly not a second appeal, where statute confers but one. The verbs "reopen" and "revisit" obscure what in fact is happening. A final judgment was given, which is not a nullity. In exceptional circumstances only this Court will exercise its inherent jurisdiction to recall that judgment. "Recall" was the description used in *Banks v R*, rightly in our view.[37] We discuss the formal process in more detail below.

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33 But not before that determination: *Wong v R*, above n 1, at [13(a)], citing *R v Smith* [2003] 3 NZLR 617 (CA), at [46]–[49].

34 *R v Smith,* above n 33.

35 Court of Appeal (Criminal) Rules 2001, r 45B.

36 *R v Smith,* above n 33.

37 *Banks v R*, above n 2, at [23].

[26] Secondly, the applicable principles have been set out in a number of authorities: *R v Smith, R v Palmer* and *McMaster v R* are the leading decisions.[38] In *R v Smith* Elias CJ described the Court's inherent power generally in these terms:[39]

> Such power is part of the implied powers necessary for the Court to "maintain its character as a court of justice". Recourse to the power to reopen must not undermine the general principle of finality. It is available only where a substantial miscarriage of justice would result if fundamental error in procedure is not corrected and where there is no alternative effective remedy reasonably available. Without such response, public confidence in the administration of justice would be undermined.

These principles were accepted and applied in the other decisions.[40] And in this Court's decision in *Blick v R* their impact was summarised thus:[41]

> Three factors assume relevance ... One is that the Court's power to reopen derives from an implicit power to suppress abuses of its process and control its own practice where a party through no fault of its own has been subjected to an unfair procedure. The second factor is that the circumstances necessary to justify a recall must be exceptional. The third factor is that the power is strictly circumscribed and does not allow a party a general right to reopen an appeal.

[27] Thirdly, it follows that there are three preconditions to achieving recall, all of which must be met:[42]

(a) a "fundamental error in procedure";

(b) a substantial miscarriage of justice if the error is not corrected; and

(c) the absence of an alternative effective remedy.

[28] Fourthly, the first precondition, a "fundamental error in procedure", has been the subject of some controversy. A suggestion was made, *per obiter*, in *Wong v R* that the recall jurisdiction may be available where the fundamental error was in the trial,

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38 *R v Smith,* above n 33; *R v Palmer* [2007] NZCA 350; and *McMaster v R*, above n 9.
39 *R v Smith*, above n 33, at [36].
40 *McMaster v R,* above n 9, at [61]–[64]; and *R v Palmer,* above n 38, at [7] and [9].
41 *Blick v R* [2012] NZCA 373 at [27].
42 *R v Smith,* above n 33, at [36].

rather than appellate, process.[43] Some doubt as to that conclusion was expressed by this Court subsequently in *McMaster v R*:[44]

> While the possibility of errors in the trial process justifying a second appeal was left open in *Wong*, we see no need to consider the extent of any such jurisdiction in the present case beyond observing that this Court has emphasised the closely circumscribed and exceptional nature of the inherent jurisdiction to entertain a second appeal.

As the Court observed:[45]

> Our research shows that the cases in which the inherent jurisdiction to reopen has been exercised have all involved errors of process by this Court as in *Smith* or where, without error on the part of the Court, something has gone seriously wrong with the appeal process such as the failure to disclose material facts to the appeal court as occurred in *Smail* and in *Banks.*

[29] It is unnecessary for this question to be resolved here. It can await a case where the issue is directly before the Court. We merely observe that the scope of the power of recall described in *R v Smith* is a narrow one, based on impeachment of the appellate decision. It is the appellate decision that is being recalled. Trial process error may be an available ground of appeal in itself. The omission of counsel to then advance an available ground of appeal does not necessarily mean there has been a qualifying appellate process error. It is true that the process error need not necessarily be one of the Court's own making. In *Banks v R* it was action (or inaction) by the Crown that resulted in a process error justifying recall.[46] But none of the present applications concern trial or appellate counsel error. We therefore leave for another day the question whether a fundamental error by trial or appellate counsel might give rise to a sufficient error to qualify for recall of the appellate judgment.

[30] Fifthly, we comment briefly on the third precondition, the absence of an alternative effective remedy. Absent a nullity or recall, once the first appeal court has determined the appeal finally, that Court is *functus officio*. But as we observed at [17], a second appeal court, whose jurisdiction depends on leave, may never be

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43 *Wong v R*, above n 1, at [21].

44 *McMaster v R*, above n 9, at [62].

45 At [62]. A similar view was expressed in *R v Palmer*, above n 38, at [10], although it preceded *Wong* by some years.

46 The same was probably true in *Smail*, although recall was not needed: *Wong v R*, above n 1, at [20]. It was also the case in the recent decision of this Court in *R (CA89/2018) v R,* above n 2.

functus officio.[47] Where (for instance) new evidence is identified, a second application for leave to appeal may be advanced in that jurisdiction. If leave was earlier granted (and the appeal dismissed), the application for leave may be renewed. It is then a matter for the second appeal court to decide whether to grant leave and hear the appeal or (perhaps) to refer it to the Court of Appeal or to deny leave altogether in favour of an application under s 406 of the Crimes Act.

[31] In *McMaster v R*, for example, the untapped availability of the mercy prerogative was grounds for dismissing the application.[48] On the other hand in *R (CA89/2018) v R* this Court took the view that it would recall its earlier judgment after post-appellate discovery of a forensic error by a police officer handling evidence. We observed that that was probably not an appropriate case for leave to appeal to the Supreme Court because it was an "intensely factual issue" and did not involve any issue of public importance or principle.[49] The judgment was recalled and the appeal was to be reheard by a fresh panel in the Court of Appeal.[50]

[32] Sixthly, in the criminal jurisdiction perfection of a judgment by sealing does not occur. That step may limit the availability of recall in the civil sphere. But in the criminal context a judgment of this Court is simply delivered in accordance with r 33 of the Court of Appeal (Criminal) Rules. A signed copy of the judgment is held by the Registrar, and the result is entered in the register.[51] Recall of a criminal appellate judgment, in the Court's inherent jurisdiction, may therefore occur at any time after delivery.

Applications

[33] We now turn to the operation of these legal principles to the instant applications.

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47 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*, above n 21, at [1]; and *Suckling v R,* above n 21, at [6].

48 *McMaster v R,* above n 9, at [64].

49 *R (CA89/2018) v R*, above n 2, at [31]. The decision did not refer to the alternative "substantial miscarriage of justice" ground for leave in s 74(2)(b) of the Senior Courts Act, discussed above at [17].

50 At [32]–[33].

51 Court of Appeal (Criminal) Rules, rr 33(9) and 40.

Mr Lyon

[34] Mr Lyon's application does not fall within either the first or third of the preconditions for recall noted at [27]. This is an intended fresh evidence appeal. The fresh evidence is the product of further investigations by a solicitor and a private investigator. There is no fundamental error by this Court, by the Crown or by anyone else that impeaches the appellate process. Mr Lyon must renew his application for leave to appeal to the Supreme Court, or make an application for exercise of the prerogative under s 406 of the Crimes Act. His appellate rights in this Court are spent.[52]

Mr Boyes-Warren

[35] Mr Boyes-Warren seeks in effect to be resentenced because of a decision of this Court in another appeal delivered after his own appeal was dismissed. That submission engages the issue of finality versus declaratory theory explained by this Court's decision in *Taylor v R.*[53] However for present purposes it is sufficient to record that the first precondition for recall cannot be met on that submission, the second is improbable, and the third also is not met because Mr Boyes-Warren has not exercised his appeal rights to the Supreme Court and may now apply out of time. His situation in some respects is not dissimilar to that of Mr Taylor, who applied out of time to this Court.

Ms Uhrle

[36] Ms Uhrle's position is on all fours with that of Mr Lyon.

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52 The secondary point raised about count 13 (see [5] above) is not a matter requiring appeal at all for correction. The Crown accepts no verdict should have been taken on that alternative count. But it is unclear one was: count 13 does not feature in the sentencing notes or the prior appeal. An incorrect notation on the Court record may be cured by application under r 7.1 of the Criminal Procedure Rules 2012.

53 *Taylor v R,* above n 26, at [4]–[15].

Result

[37] The applications for recall are declined.

Solicitors:
Barter & Co, Auckland for Applicant Lyon
Crown Law Office, Wellington for Respondent