IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-851
[2022] NZHC 2992

UNDER	The Judicial Review Procedure Act 2016
IN THE MATTER OF	Judicial Review of the decision to commit the applicant to trial in the District Court
BETWEEN	S Applicant
AND	THE ATTORNEY-GENERAL First Respondent
	THE AUCKLAND DISTRICT COURT Second Respondent

Hearing:	13 October 2022
Appearances:	The applicant in person Z Hamill and B So for the Respondent
Further submissions and evidence completed:	16 November 2022
Judgment:	17 November 2022

JUDGMENT OF POWELL J

This judgment was delivered by me on 17 November 2022 at 4pm.
Pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

Solicitors:
Crown Law, Te Tari Ture o Te Karauna, Wellington

Copy:
Legal Documents Officer, Auckland South Correctional facility, Auckland

[1] The Attorney-General has applied to strike out judicial review proceedings brought by the applicant.[1] The Attorney-General contends that the applicant's proceedings, which ostensibly seek to review a 2008 decision of Judge D A Burns committing the applicant to trial for sexual offending,[2] are an abuse of process and constitute a collateral attack on earlier decisions of the High Court, Court of Appeal and Supreme Court that have previously determined the issues the applicant now wishes to raise.

The applicant's proceedings

[2] The applicant denies he is attempting to re-litigate matters already determined by other Courts and argues that Judge Burns erred in committing him to trial by:

> Allowing admission of the evidential video interview of the complainant because she did [not] take an oath or make an affirmation during the interview.
>
> ("the committal issue")

[3] As a result, the applicant "requests a reconsideration of the decision to commit him to trial". In the applicant's submission if the committal decision is set aside this would mean his trial was invalid and as a result his conviction would also have to be set aside.

[4] Although no additional specific relief appears to have been pleaded, the applicant's statement of claim is not limited to a challenge to Judge Burns' committal decision. Instead, throughout the statement of claim and in his submissions on the strike-out application the applicant frequently segues into other allegations. In particular, and in addition to the committal issue, the applicant variously alleges:

(a) The medical evidence at trial was incorrect and misled the jury as a result of neither the Crown nor defence experts understanding the scale of the rape allegations made by the complainant ("the medical evidence issue").

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1 Reference to the applicant's name has been removed throughout this judgment due to the nature of the offending, where s 139 of the Criminal Justice Act 1985 applies, as well as the extensive litigation history where publication of the applicant's name may lead to identification of the victim.

2 *Police v [S]* DC Waitakere CRN 0809003987-3991, 26 November 2008.

(b) Trial counsel errors including:

(i) Failing to establish the scale of the rape allegations;

(ii) Failing to call a witness from CFYS and/or to produce the CFYS file that would have corroborated the applicant's evidence; and/or

(iii) Failing to cross-examine adequately, including the complainant and Crown medical expert.

("the trial counsel issues").

Legal principles

[5] There is no dispute as to the relevant principles applicable to the application to strike out. As Ms Hamill summarised, the position is:

> Rule 15.1(1) of the High Court Rules 2016 (**Rules**) provides that this Court may strike out all or part of a pleading if it discloses no reasonably arguable cause of action, defence or case appropriate to the nature of the pleading; is likely to cause prejudice or delay; is frivolous or vexatious; or is otherwise an abuse of the process of the court.
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> The principles underpinning the power to strike out are well known. A cause of action must be so clearly untenable that it cannot possibly succeed. A claim must be "so certainly or clearly bad" that it should be precluded from proceeding.
>
> This power will be sparingly exercised; if defective pleadings can be cured, an amended statement of claim is the preferred approach.
>
> For a court to strike out a proceeding for being an abuse of process, there needs to be an element of impropriety and misuse of the Court's processes.
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> Since *Hunter v Chief Constable West Midlands*, it has been recognised that a proceeding may constitute an abuse of the process of the Court if it challenges a judgment entered in another proceeding, even if the parties in each proceeding were not identical, which would have been required for a plea of estoppel.

Lord Diplock in *Hunter* said:

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

(footnotes omitted)

Discussion

[6] As Ms Hamill has pointed out on behalf of the Attorney-General, the current proceedings are the latest in a long line of litigation undertaken by the applicant with the intention of challenging his conviction. Having reviewed that history and the previous decisions of this Court, the Court of Appeal and the Supreme Court I am left in no doubt whatsoever that the issues the applicant seeks to raise have already been considered and as a result it would be an abuse of process to allow the present judicial review proceedings to continue.

Previous litigation

[7] After being committed for trial by Judge Burns, the applicant was found guilty by a jury on four charges of sexual violation by rape (two representative) and three charges of sexual violation by unlawful sexual connection (one representative). He was sentenced by Judge J P Gittos to 16 years' imprisonment with a minimum period of imprisonment of 10 years.[3]

[8] The initial challenge undertaken by the applicant was an appeal against conviction, heard by the Court of Appeal in 2013. Six separate grounds were raised, all involving trial counsel error, including the trial counsel issues set out above. The Court of Appeal dismissed the applicant's appeal ("the conviction appeal judgment"), concluding there was no substance in any of the issues advanced.[4]

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3 *R v [S]* DC Auckland CRI-2008-090-003508, 18 May 2010.
4 *S (CA361/2010) v R* [2013] NZCA 179 ("the conviction appeal judgment").

[9] The applicant did not immediately seek leave to appeal to the Supreme Court. Instead, he applied to revisit the conviction appeal judgment on the basis of a failure of trial counsel to call the CYFS witness and the failure of trial counsel to deal adequately with the medical evidence. The application was treated by the Court of Appeal as an application for recall and dismissed.[5]

[10] The applicant then brought the first in a series of habeas corpus applications. This was rejected by the High Court.[6] Faire J noted that if the applicant wished to challenge the conviction appeal judgment the appropriate avenue was an appeal to the Supreme Court.[7]

[11] A further application for habeas corpus however followed and was rejected on the grounds that the applicant was lawfully detained.[8] An appeal to the Court of Appeal against the decisions declining habeas corpus and a decision declining to entertain further applications for habeas corpus followed, in which the applicant continued to rely upon the issue of the failure of trial counsel to call the CYFS witness and the medical evidence issues, and was also dismissed by the Court of Appeal.[9]

[12] Undeterred, the applicant unsuccessfully sought leave to appeal the Court of Appeal judgment on the habeas corpus issues to the Supreme Court. Dismissing the application for leave to appeal, the Supreme Court noted that the applicant's application for habeas corpus "although dressed up as a challenge to the conduct of the judges who sat in the Court of Appeal, is in effect a challenge to the convictions".[10] A subsequent application for the Supreme Court to recall its decision was also dismissed.[11]

[13] Around the same time the applicant initiated the first judicial review proceedings. In determining one of these in early 2015, Courtney J referred to an earlier determination by Ellis J in December 2014 which had noted that "any defects

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5 *S (CA361/2010) v R* [2013] NZCA 359.
6 *S v Chief Executive of the Department of Corrections* [2014] NZHC 1157.
7 At [13].
8 *[S] v Attorney-General* [2014] NZHC 1232.
9 *[S] v Chief Executive of the Department of Corrections* [2014] NZCA 308.
10 *[S] v Chief Executive of the Department of Corrections* [2014] NZSC 120 at [5].
11 *[S] v Chief Executive of the Department of Corrections* [2014] NZSC 128.

in the pre-trial process [alleged by the applicant] would have been cured by the subsequent trial and, in any event, the application was a thinly disguised collateral attack on the outcome of the trial".[12]

[14] The applicant then returned once more to seek recall of the conviction appeal judgment, and also sought bail pending the determination of that application. Both applications were ultimately declined,[13] the Court of Appeal noting in relation to the second recall application that the applicant was once more seeking to revisit the failure to call the CYFS officer and the medical evidence issues, as well as raising issues with appellate counsel.[14] The applicant was also unsuccessful in attempting to appeal the decision of Courtney J which, given it raised essentially the same issues as the second application for recall, was found to be an abuse of process.[15]

[15] A further judicial review proceeding followed. Brewer J dismissed the application because "the specific allegations made by [the applicant] have been considered by the Court of Appeal", and "to proceed with the judicial review application would be an abuse of the process of the Court and, further, on this analysis there is no reasonable cause of action disclosed".[16]

[16] The applicant then filed a third unsuccessful application to recall the conviction appeal judgment. It was accepted by the applicant that his application raised nothing new, and the Court therefore concluded "he is seeking to relitigate matters that have already been comprehensively settled in this Court", and that "his third recall application is an abuse of process".[17] Subsequent applications to recall the conviction appeal judgment for a fourth, fifth and sixth time were also categorised as further abuses of process and the Court of Appeal Registry was directed not to accept any of them for filing.[18]

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12 *[S] v Auckland District Court* CIV-2008-090-003508, 8 January 2015 at [5].
13 *S (CA361/2010) v R* [2015] NZCA 109 in relation to bail and *S (CA361/2010) v R* [2015] NZCA 259 on the second recall application.
14 At [14]–[15].
15 *S (CA34/2015) v Auckland District Court* [2015] NZCA 110 at [9].
16 *[S] v Office of Police Commissioner* [2015] NZHC 1408 at [26].
17 *S (CA361/2020) v R* [2015] NZCA 358 at [5].
18 *[S] v R* CA361/2010, 19 August 2015 (Minute of White J); 15 March 2016 (Minute of French J); and 1 September 2021 (Minute of French J).

[17] Likewise, and despite the conclusion reached by Brewer J, the applicant filed a further set of judicial review proceedings in which he again sought to revisit the medical evidence issues. As Asher J noted, once again no new material was provided: the applicant having "just regurgitated the same allegations he has previously made" in order to sidestep the appeal process that he has exhausted.[19] As a result his Honour concluded the applicant's actions were "a very blatant abuse of the procedure of this Court", as well as a collateral challenge to the judgment of Brewer J.[20] The proceedings were therefore struck out.[21]

[18] It was not until 2017 that the applicant finally sought leave to appeal the conviction appeal judgment to the Supreme Court. In its judgment the Supreme Court accepted that an extension of time to apply for leave to appeal should be granted,[22] but concluded that the substantive issues raised with regard to the medical evidence issues did not provide "a basis for apprehension that a substantial marriage of justice has occurred".[23] The application for leave to appeal was therefore dismissed.

[19] A second application for leave to appeal followed in 2021. As his first application had been dismissed, the Supreme Court treated the second as an application to recall the 2017 judgment.[24] At that point five issues were raised by the applicant:[25]

(a) the medical opinion evidence adduced at trial was incorrect and misled the jury;

(b) trial counsel failed to call a crucial defence witness and also failed to introduce evidence that corroborated the applicant's evidence;

(c) the Court of Appeal should not have accepted trial counsel's evidence on the applicant's claim of inadequate representation by trial counsel;

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19 *[S] v Independent Police Conduct Authority* [2016] NZHC 1571 at [30].
20 At [32].
21 At [41].
22 *S (SC39/2017) v R* [2017] NZSC 169 at [9].
23 At [11].
24 *S (SC39/2017) v R* [2022] NZSC 7 at [2].
25 At [4].

(d) the Crown failed to follow up on evidence that would have corroborated the applicant's statements in evidence; and

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

[20] Addressing these issues, the Court determined:[26]

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

[21] Finally (at least to date), in May 2022 the applicant sought a further recall of the 2017 Supreme Court leave judgment again raising issues around the trial counsel issues including the failure to adequately cross-examine the complainant and/or to obtain the CYFS file. Dismissing that application, the Supreme Court noted:[27]

> [The applicant's] current application for recall essentially raises the same grounds raised in his previous recall application. Those have already been considered and rejected by this Court.

The present proceedings

[22] As the foregoing narrative makes clear, all issues with regard to the medical evidence issue and the trial counsel issues have all been comprehensively determined against the applicant from the conviction appeal judgment onwards. To continue to raise these issues, as has been consistently noted, is an abuse of process.

[23] It is equally clear that the centrepiece of the present proceedings, the committal issue, has also been definitively determined and, as with the other issues, it is an abuse of process to seek to revisit it under of the guise of the present judicial review proceedings.

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26 At [7].
27 *S (SC39/2017) v R* [2022] NZSC 57 at [3].

[24] As noted, while it is clear that the committal issue was not raised by the applicant in his conviction appeal to the Court of Appeal, it does appear that pre-trial issues were first raised and discussed as early as 2015, as part of judicial review proceedings considered by Ellis J,[28] and have in any event been considered by the Supreme Court in both of the Supreme Court recall judgments. It is not tenable for the applicant to submit that the Supreme Court analysis was limited only to the matters previously determined by the Court of Appeal and that the committal issue was therefore ignored, a conclusion that is only reinforced by the second Supreme Court recall judgment.

[25] In any event, and leaving aside the fact that the Supreme Court decision on the committal issue is binding on this Court, it is clear that there is no substance to the committal issue. As Ellis J apparently noted in 2014 "any defects in the pre-trial process would have been cured" by the subsequent trial. The committal process as it operated in 2008 was intended to ensure that charges which did not reach the appropriate evidential threshold would not go to trial but did not require any substantive determination of admissibility issues, and in the event the evidential threshold was not met the charges were able to be re-laid with leave.[29] Given the nature of the committal process, in the absence of a successful challenge to a committal decision prior to that trial taking place there is simply no legal basis to suggest the result of the trial would be invalidated by any defects in the committal process.[30]

[26] Furthermore, in this case it is noted that the issue with the committal process identified by the applicant is that Judge Burns committed the applicant to trial on the basis of the complainant's unsworn evidential video interview. There is however no dispute that:

(a) as Judge Burns noted, had his Honour declined to allow the unsworn statement to be relied upon, changes introduced by the Summary Proceedings Amendment Act 2008 would have allowed the charges to

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28 See *[S] v Auckland District Court,* above n 12.

29 *Police v D* [1993] 2 NZLR 256 at 529; *Daemar v Gilliand* [1981] 1 NZLR 61 at 62.

30 A conclusion that is not affected by the additional authorities provided by the applicant on 16 November 2022.

be re-laid and the unsworn evidence in question to be relied upon within a short time of the hearing before him;[31] and in any event

(b) the complainant was sworn prior to giving evidence at the trial itself and it was on the basis of the sworn evidence, not the unsworn evidence produced at the committal hearing, that the applicant was convicted.

[27] For these reasons therefore, and as the Supreme Court noted in its first recall judgment, any errors alleged with the committal process were peripheral and would not have affected the outcome of the trial.

[28] Taking these matters together there can be no doubt the present proceedings are an abuse of process and must be struck out. As a consequence of striking out these proceedings the applicant's parallel application for interim orders, namely release from prison pending the determination of his judicial review proceedings, also cannot be considered.

Decision

[29] The application to strike out is granted. The applicant's proceedings, including his application for interim orders, are struck out.

[30] Notwithstanding the applicant's status as a prisoner the fact that these proceedings are manifestly an abuse of process means that the Attorney-General is entitled to costs. Any memorandum on behalf of the Attorney-General is to be filed by **25 November 2022** and any response by the applicant by **9 December 2022**. I will then determine the issue on the papers.

Powell J

[31] *Police v [S]*, above n 2, at [87].