**IN THE SUPREME COURT OF NEW ZEALAND SC 48 /2008**

**[2008] NZSC 54**

Between **Vince Siemer**

Appellant

And **Solicitor General of New Zealand**

Respondent

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APPLICATION FOR RECALL of SUPREME COURT JUDGMENT dated 17 May 2010

Application dated: June 2010

Submitted by:

**Vince Siemer**

27 Clansman Terrace, Gulf Harbour (fax) 09 428 2521

**To the Registrar of the Supreme Court:**

**VINCE SIEMER,** the appellant in the proceeding identified above, gives notice that I hereby apply for recall of the decision of the Supreme Court SC48/2010 [2010] NZSC 54, dated 17 May 2010.

**THE SPECIFIC GROUNDS** upon which the appellant seeks recall of the judgment is that it is necessary in the interests of justice and extreme public importance due to[[1]](#footnote-1):

***The Supreme Court decision is unsafe.***

1. The factual question of whether the appellant’s publications were in breach of a gag injunction was part of the Application for Leave against the Court of Appeal judgment – a judgment which the Supreme Court has now quashed. The Minute of the Supreme Court dated 7 August 2009 explicitly included this as a valid ground. Despite this, both Counsel were made well aware that the Supreme Court bench did not want this valid and accepted ground explored at the hearing[[2]](#footnote-2).
2. In its reserved decision (subject of this recall application), the Supreme Court issued a *new* judgment order sentencing the appellant to prison for (unspecified) continuing breach of this gag injunction.
3. Any decision is unsafe, and the subject Supreme Court decision logically impeached, when the bench relied upon unrepresentative quotes from Crown submissions to issue a *new* guilty judgment. I say “unrepresentative” because the particular quote relied upon was altered to omit words censored in September 2007 – an edit which would have proven the appellant conformed to the demands from the Solicitor General.
4. While relying upon unrepresentative and unsworn statements from counsel, the Court conversely ignored incontrovertible EVIDENCE it had before it which proved the appellant should have been acquitted on this valid appeal ground approved by the Court.
5. The Affidavit of Vincent Ross Siemer dated 21 May 2010 is submitted with this recall application as further evidence this was the case.
6. Another accepted appeal ground was the constitutional ramifications of the trial procedure adopted in the Courts below (and previously in New Zealand Law). On this ground, the Court of Appeal ruling against the appellant could not legally be sustained and was quashed by the Supreme Court.
7. The Supreme Court held retrospectively the Solicitor General could not have gotten more than 3 months imprisonment, and presumably acted unlawfully, in seeking any term that could exceed that period. The Supreme Court found also that the High Court was wrong and the Court of Appeal was wrong (confirming the appellant’s position).
8. The Supreme Court judgment accepts that at the time of the appellant’s trial, the sentence sought entitled the appellant a right to trial by jury which was denied him.
9. The Supreme Court “corrected” this by holding, essentially *ex cathedra,* that the position back in January – August 2008 was different than the de facto reality and that the seeking and imposing of sentence which exceeded accepted statutory limitations sans jury was a mere oversight of requisite form by Crown and judicial officers these last 3 ½ years.
10. This kind of retroactive “fix” does not address the reality that the appellant was tried and served part of his sentence under the now-accepted-to-be unlawful process.
11. Moreover, as challenge to length of sentence was not a ground under appeal or cross-appeal – and no submissions were made in respect to it – the appellant was denied his fundamental right to be heard. The gravity of this is underscored by the fact that the Supreme Court issued a *new order* imposing the maximum sentence upon the appellant without allowing his counsel to address this issue. Also, there is no analysis in the Supreme Court ruling justifying why the worst possible sentence is being imposed.
12. Whether or not Supreme Court judges wish to send the appellant to prison on no evidence, the pertinent question must be whether they should be allowed to do so. In law, the appellant is still entitled to be sentenced according to legal principles.
13. That includes:

• The right to dispute facts not proved in the case.

• Present actions undertaken to comply, including the acknowledgment from the Domain Name Commissioner – who, in turn, expressly claimed concurrence from Crown Law – that the appellant was in compliance of the injunction.

• Assert motivation that mitigates.

• Seek help and guidance from the Courts on compliance consistent with Bill of Rights (freedom of speech) principles

• Look at what harm, if any, his accurate reporting has done to Mr Stiassny

• Look at the appellant’s own circumstances, where the Courts have prevented him from defending himself, struck out his statement of defence and twice imprisoned him for printing the provable truth about private sector commercial corruption in New Zealand.

1. Absent all this, the Supreme Court proceeded to sentence the appellant to the maximum available period. Without explanation or legal analysis the Court assumed the appellant could be serially imprisoned for all future alleged failures to comply. That compliance, in turn, is to be judged by the High Court at Auckland and includes the new provision that the appellant undertakes in writing not to breach in future. **Yet the official court record clearly demonstrates that both the High Court and Court of Appeal overstated and misapplied the gag injunction.**
2. Adding such a condition is impossible because, without any cogent debate or analysis, the Court has adopted the unsound proposition that the old defamation concept of publication has been uniquely morphed in respect to internet publication – i.e. every new viewing is a new publication and therefore a new breach.
3. Unless a sentencing Court is able to grasp that sheer impossibility of drawing back every published fragment on the internet, they cannot properly judge compliance efforts.
4. The Court held, following *Cohn*, that all this could be remedied by declaring the *sentence* invalid. But the appellant’s jeopardy lied in the High Court at Auckland in January–August 2008. Despite the – now accepted to be – fundamental and legally-flawed measures, at least the appellant had a mock hearing on the facts there.
5. The new Supreme Court order “resolved” this without affording the right to address the key ingredients of the appellant’s jeopardy; namely, how bad was it, is it now, and what interests of justice are served by committing a law-abiding citizen to prison.

**Remedy Sought**

***Judgment conclusions to be based upon evidence before the Court***

1. Asthe unsafe and new Supreme Court ruling hinges entirely on the question of fact upon which leave to challenge was granted, but oral submissions and evidence evaded, the decision should be recalled and the facts of the case determined on the *evidence* which isbefore the Court. If not recalled, the current Supreme Court order will send a man to prison based solely upon unsworn submissions of counsel – submissions which now have been evidentially shown to be materially altered and unrepresentative. Conversely, the evidence already before the Supreme Court – none of which was mentioned in the decision – proves the appellant’s innocence.
2. A jury would have been required to make such a determination of fact on the relevant evidence. Judges are no exception to this requirement.

**Remedy Sought in Respect of Sentence**

1. All the findings in respect of resentencing be recalled and sentence reheard, on the evidence. Alternatively, sentencing remitted back to the High Court for determination.

**Further Particulars**

The appellant is out of New Zealand until 29 June 2010. When he left New Zealand there was no way of knowing when the Supreme Court Decision would be delivered. It is understood that, in fact, only hours notice were given to Counsel.

Therefore, although appellate Counsel, R M Lithgow QC will be unavailable from Friday 11 June and is overseas from 15 June, the appellant has asked him to file this application for recall as counsel.

To find replacement counsel in a country where there is effectively no independent bar, the appellant will require some days of freedom of movement after his return.

Dated at Wellington this th day of June 2010.

….....................................

Vince Siemer (appellant)

*By his Counsel*

CC: McElroys Lawyers

P.O. Box 835

Auckland,

(Facsimile: 09 309 7558)

The address for service is : Vince Siemer, 27 Clansman Terrace, Gulf Harbour

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1. Provided by Section 13 of the Supreme Court Act 2003 [↑](#footnote-ref-1)
2. Refer to hearing transcript, SC48/2009, Wellington 2 March 2010 [↑](#footnote-ref-2)