IN THE SUPREME COURT OF NEW ZEALAND

SC 13/2013
[2013] NZSC 28

JASON MARK FERGUSSON

v

THE QUEEN

Court: McGrath, William Young and Glazebrook JJ

Counsel: T Ellis for Applicant
K E Salmond for Crown

Judgment: 11 April 2013

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant has applied for leave to appeal to this Court against the sentence of life imprisonment that was imposed on him early in 2003, following his conviction for murder in 2002.

[2] He has already been permitted by the Court of Appeal to bring an appeal against his conviction out of time. In 2008 the resulting appeal was dismissed,[1] following full consideration by that Court of a wide range of grounds. The principal ground was that the applicant was unfit to stand trial under Part 7 of the Criminal

1 *Ferguson v R* [2010] NZCA 2.

Justice Act 1985. The Court of Appeal was satisfied that the applicant was fit to stand trial and that his situation in that respect had not altered "between his initial involvement in the court system and his eventual trial".[2] An application to this Court for leave to appeal against that judgment was dismissed.[3]

[3] In 2011 the applicant applied to the Court of Appeal for an extension of time to bring a new appeal, this time against his sentence. The Court was told that the purpose of this appeal was to have the applicant removed from prison into intellectual disability care. The applicant asked the Court invoke its powers under the Criminal Procedure (Mentally Impaired Persons) Act 2003 to order that the applicant should, instead of being imprisoned, receive care under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. The ground of the proposed appeal is that the sentence of life imprisonment was manifestly excessive.

[4] Section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act provides that prisoners having intellectual disability can be assessed for suitability for a compulsory care order. It seems that the prison authorities have already applied under s 29 to have the applicant's eligibility for a compulsory care order assessed. The outcome was not successful from his point of view but the possibility of a s 29 referral in the future has been left open.

[5] The Court of Appeal dismissed the application.[4] The main reasons were the unexplained lengthy delay since the sentence was imposed in 2003 and the fact that the applicant had already been permitted to bring an appeal against conviction, out of time, based on his mental state. As well, the Court of Appeal decided the proposed appeal was without merit. The Court was satisfied that it was through the provisions in the Intellectual Disability (Compulsory Care and Rehabilitation) Act the situation of prisoners such as Mr Fergusson is to be addressed.[5] The legislation did not provide for retrospective appeals against sentence.

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2 At [74].
3 *Ferguson v R* [2010] NZSC 98.
4 *Ferguson v R* [2012] NZCA 581.
5 At [35].

[6] There is one factual matter we should clarify. The Court of Appeal, in its recent judgment, said of the applicant's intellectual disability that "[he] has a Full Scale Intelligent Quotient (FSIQ) in the range of 60–68". Mr Ellis, on his behalf, says in his submissions in support of leave to appeal that the Court of Appeal is wrong and that his IQ is 56. The Crown, in its submissions, has explained the apparent inconsistency. Intellectual disability is indicated when a person's FSIQ is below the range of 70–75. The Court of Appeal relied on a report by a specialist assessor in 2010 for the appeal determined in 2012,[6] determining the FSIQ to be in the range of 60–68. Counsel's figure of 56 relied on a report by the defence psychologist from the earlier conviction appeal, which, the Crown says, used a different measure. The author of the 2010 report considered the results to be consistent in that different measures are involved. This indicates that there is no inconsistency between the figures or error by the Court of Appeal. That appears to be correct on what we have been told. But in the end the precise FSIQ has no relevance to a determination of the leave application.

[7] The present application to this Court seeks leave, first, to appeal against the Court of Appeal's decision refusing to extend time for a sentence appeal. In the alternative, the applicant applies to appeal direct to this Court against the High Court's 2003 sentencing decision.

[8] There is no right to appeal to this Court against a decision refusing to extend time for appeal. Section 383A(1) only permits appeals with leave from decisions of the Court of Appeal *on appeal* and an application for extension of time is not of that character. Recognising the likelihood that this Court would so hold, counsel for the applicant also seeks leave to bring a leapfrog appeal against the High Court's sentencing decision. Although there is no statutory bar against such an appeal, unless there are compelling circumstances this Court will not permit direct appeals where their effect would be to circumvent the inability of an applicant to appeal against the refusal of the Court of Appeal to extend time for appeal. As well, the Court is required by s 14 of the Supreme Court Act only to permit a direct appeal in exceptional circumstances.

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6 *Ferguson v R* [2012] NZCA 581.

[9] In this case, the applicant does not meet either threshold. Three grounds for appeal are proposed. The first is that, as a prisoner sentenced prior to the Criminal Procedure (Mentally Impaired Persons) Act coming into force, the applicant is entitled to be resentenced. The legislation makes no such provision and we are satisfied that proposition is not arguable. The second ground is that the applicant is entitled to the benefit of the law change in 2003 and accordingly should be detained in compulsory intellectual disability care, rather than imprisoned. Section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act provides a legislative course for that procedure, but it has nothing to do with the correctness of the sentence imposed in 2003, which must be the focus of an appeal to this Court. Finally, criticisms are made of counsel who appeared for the accused at his trial and sentencing. These criticisms have been carefully examined in earlier judgments on conviction appeals and found to be without merit. No good reason has been given to allow them to be relitigated in a sentencing appeal. Nor is there anything in the claim these errors were repeated in the Court of Appeal.

[10] In other respects, the applicant's submissions contend generally that it is for the Court to address the situation of prisoners with intellectual disabilities. Parliament, however, has provided in s 29 for a different procedure for doing so. We are satisfied that no issue of general or public importance or possible substantial miscarriage of justice in relation to his sentencing arises from the involvement of the applicant in the criminal justice process. Indeed, the impact of the applicant's intellectual disability and its relationship with his conduct have been fully and carefully assessed by the courts at each stage.

[11] For these reasons, the application for leave to appeal is dismissed.

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