NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html

NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS IN 2000 OFFENDING PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 8/2019
[2019] NZSC 79

BETWEEN	RENE MISCHELLE DE KWANT Applicant
AND	THE QUEEN Respondent

Court:	O'Regan, Ellen France and Williams JJ
Counsel:	A M S Williams for Applicant K Peirse-O'Byrne for Respondent
Judgment:	24 July 2019
Reissued:	25 July 2019

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant seeks leave to appeal against the decision of the Court of Appeal dismissing his appeal against the imposition of a sentence of preventive detention.[1]

Background

[2] The background to the application is as follows. Mr de Kwant was sentenced to nine years' imprisonment for sexual offending in 2000. There were three complainants all of whom were young children. The offending took place over the period from 1990 to 1998 and included sexual violation by digital penetration, rape by anal penetration and inducing indecent acts.

[3] After the 2000 offending was disclosed, Mr de Kwant attended a STOP programme. Whilst in prison he undertook what the Court of Appeal described as "extensive therapy".[2] He was released on parole in 2006. The current offending took place over an 18 month period from June 2015 to January 2017. It involved indecent assaults of a friend's son (aged between eight and ten years old) whom he cared for on numerous occasions.[3] The offending came to light in February 2017 when the boy confided in his mother after Mr de Kwant had organised a tramping trip for himself and the boy.

[4] In sentencing Mr de Kwant in September 2017, Mander J identified the appropriate finite sentence (following an early guilty plea) as three years and seven months' imprisonment.[4] Preventive detention with a minimum period of imprisonment of five years was imposed. Mr de Kwant appealed to the Court of Appeal against sentence.

[5] In dismissing the appeal, the Court of Appeal first addressed the argument made by Mr de Kwant that the sentencing Judge had not recognised the

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1 *De Kwant v R* [2018] NZCA 600 (Asher, Lang and Moore JJ) [CA judgment].
2 At [22]. He completed the Kia Marama course.
3 Mr de Kwant pleaded guilty to a representative charge of indecent assault on a boy under 12.
4 *R v de Kwant* [2017] NZHC 2291.

"comparatively minor" nature of the current offending.[5] The Court took the view that while this offending was "considerably less serious" it was not minor (repeated masturbation of a young child over an 18 month period) and the Judge had not made any error in his analysis of it.[6]

[6] Second, the Court rejected a challenge to the assessment Mr de Kwant was at high risk of reoffending. The Court considered the experts' reports in this respect were confirmed by the facts. The Court noted also that the treatment Mr de Kwant had received and his remorse had not prevented him from "deliberately cultivating another relationship … and subjecting [the current victim] to the same kind of abuse" (although less serious).[7] The Court agreed with Mander J's assessment that Mr de Kwant "demonstrates an inability to sustain whatever gains he has made as a result of intensive treatment".[8]

[7] Finally, the Court did not consider Mr de Kwant's current efforts at rehabilitation could give the Court confidence he would not reoffend.

The proposed appeal

[8] Mr de Kwant seeks leave primarily on the basis a miscarriage of justice may have occurred because the sentence of preventive detention was manifestly excessive and overly punitive. The applicant also says a matter of general or public importance arises where this Court could usefully give guidance in a case, like the present, where preventive detention has been imposed in relation to offending which is less serious than the initial offending. He wishes to argue the Courts below have not given effect to the principles in *R v Parahi* and, in particular, the proposition that in this situation, preventive detention should only be imposed in exceptional cases.[9]

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5 CA judgment, above n 1, at [14].
6 At [18].
7 At [24].
8 At [25].
9 *R v Parahi* [2005] 3 NZLR 356 (CA).

Assessment

[9] The Court of Appeal in *Parahi* suggested cases where preventive detention may be imposed for indecencies as opposed to sexual violation were "likely to be exceptional, and will usually turn on persistent, knowing behaviour, despite firm warnings … accompanied by the necessary cumulatively serious harm".[10] The conclusion preventive detention should not have been imposed in that case turned on the particular combination of facts.

[10] Where the present case lies in terms of the approach in *Parahi* is a question of fact. No question of general or public importance arises.

[11] Nor do we see any appearance of a miscarriage of justice in the Court of Appeal's assessment of the case. Mr de Kwant can point to the delay in reoffending after his release in 2006 but that had to be weighed against the other features of his case. This is not in the category of cases in which this Court will grant leave on a sentencing matter.[11]

[12] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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10 At [86].

11 See, for example, *Burdett v R* [2009] NZSC 114 at [4]; *Trotter v R* [2005] NZSC 7 at [6]; and *Hakaoro v R* [2014] NZSC 169.