IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 66/2020
[2020] NZSC 106

BETWEEN	ERNEST SMITH Applicant
AND	THE QUEEN Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: A N Isac QC and M R G van Alphen Fyfe for Applicant
J M Irwin for Respondent

Judgment: 7 October 2020

JUDGMENT OF THE COURT

A The application for an extension of time to apply for leave to appeal is granted.

B The application for leave to appeal is dismissed.

REASONS

[1] The applicant pleaded guilty to the murder of his former partner. The murder took place in November 2012. The plea was entered in September 2013 after a sentencing indication. The applicant was sentenced to life imprisonment with a minimum period of imprisonment (MPI) of 17 years.[1]

[2] The applicant appealed against his sentence to the Court of Appeal, arguing that the MPI of 17 years was excessive. That appeal was dismissed.[2]

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1 *R v Smith* [2013] NZHC 2782 (Ronald Young J) [Sentencing remarks].
2 *Smith v R* [2016] NZCA 617 (Wild, Miller and Brown JJ) [CA judgment].

[3] He now seeks leave to appeal against the Court of Appeal decision. His application for leave is almost four years outside the period within which such an application should be made.[3] The applicant seeks an extension of time, arguing that the delay is explained by the fact that he has learning difficulties, borderline cognitive functioning and illiteracy, all of which make it difficult for him to proactively seek legal services and instruct counsel. The respondent opposes an extension. We accept that the delay is considerable, but there is no real prejudice to the respondent and the personal difficulties of the applicant have contributed to the delay. In the circumstances we have decided to grant the extension and consider the application on its merits.

[4] The murder involved a considerable degree of planning. The applicant and the deceased had been together for some years and had a son together. But the relationship had foundered after incidents of family violence and the couple separated. On the day of the murder, the applicant went to the house of the deceased when she was out and hid in the roof cavity for several hours. After the deceased and her children had gone to bed, he descended into the house, entered the bedroom where the deceased and their infant son were sleeping and stabbed the deceased multiple times. She bled to death. Her 15-year-old son discovered her body the following morning.

[5] The applicant was subject to a number of pre-trial psychiatric assessments. He was found fit to stand trial and his guilty plea was entered soon after that finding was made. One of the psychiatric assessors, Dr Barry Walsh, expressed the view that the applicant displayed evidence of "severe dysfunction in his personality allied with limited intelligence, impaired literacy and the effects of cultural and language difference".

[6] In sentencing the applicant, the High Court Judge concluded that the circumstances of the murder were such that s 104 of the Sentencing Act 2002, which mandates an MPI of not less than 17 years (unless manifestly unjust), was engaged.[4] The reason for this was the calculated planning, the fact that the offending had

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3 Supreme Court Rules 2004, r 11.

4 Sentencing remarks, above n 1, at [23].

involved unlawful entry into the deceased's dwelling, the high degree of brutality, cruelty and callousness involved in the murder and the vulnerability of the deceased.[5]

[7] The Judge took a starting point for the MPI of 18–19 years. He considered that the only mitigating factor was the guilty plea, which could justify only a modest deduction because it came 11 months after the applicant was charged.[6] The Judge noted the personality factors which may have contributed to the murder, namely the applicant's particularly rough childhood, limited intellectual functioning, poor literacy and depression. But the Judge did not see these as being sufficiently causative to be brought to account as mitigating factors.[7] The sentence imposed was, therefore, life imprisonment with an MPI of 17 years.[8]

[8] When the case reached the Court of Appeal, the Court ordered a further psychiatric assessment by Dr Duff. In brief, her report concluded that the applicant had a borderline intellectual level of function, his mental state deteriorated significantly in the months leading up to the murder and that he had had a traumatic and deprived upbringing. While these factors did not explain the offending, the ultimate interpretation of his offending at the sentencing as being solely based on angry and revengeful feelings may have insufficiently accounted for the evidence of the identified factors.[9]

[9] After receipt of Dr Duff's report, Kós P directed that the appeal be heard by a permanent court, rather than a divisional court.[10] There were two reasons for this. First, Kós P envisaged that the permanent court would address whether guilty plea discounts in accordance with this Court's decision in *Hessell v R*[11] should apply in s 104 murder cases, rather than the more limited discounts available under the Court of Appeal's decision in *R v Williams*.[12] He noted that a divisional court in *Malik v R* had indicated that, if *Hessell* discounts were to apply, then there may need to be higher

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5 At [16]–[17].
6 At [23]–[24].
7 At [18].
8 At [25].
9 CA judgment, above n 2, at [21]–[25].
10 See at [4].
11 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.
12 *R v Williams* [2005] 2 NZLR 506 (CA).

starting points for murders covered by s 104.[13] Secondly, he considered the issue of the appropriate discount for relevant mental illness in light of s 104 of the Sentencing Act should be addressed.

[10] As it turned out the permanent court panel that dealt with the applicant's appeal to that Court did not engage with the issues identified by Kós P. This was because the Court considered they did not arise on the facts. There was no dispute that the starting point adopted by the High Court Judge was appropriate.[14] The Court was not convinced that there was sufficient link between the applicant's personal difficulties and the offending to call into question the extent of the High Court Judge's discount for these factors[15] and only a small discount was justified for the guilty plea entered 11 months after the charge was laid and in the face of a strong Crown case.[16] That meant that the case was not, contrary to Kós P's expectation, an appropriate vehicle to address the issues he had foreshadowed.[17]

[11] Since the decision in the present case, the Court of Appeal has again considered the question of the level of guilty plea discounts available in a case in which s 104 of the Sentencing Act is engaged in *Momoisea v R*.[18] In that case the Court refused to revisit the level of guilty plea discounts in s 104 cases and refused to overrule *Malik*, which, it noted, had been cited with approval by the Court of Appeal on five occasions.[19]

[12] Ms Momoisea sought leave to appeal to this Court but leave was declined. In relation to the question of whether *Hessell* discounts should apply in s 104 cases, this Court said:[20]

> [7] Section 104 provides that in the circumstances set out in that section, an MPI of at least 17 years must be imposed unless the court is satisfied it would be "manifestly unjust to do so". The logic of the proposed argument

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13 *Malik v R* [2015] NZCA 597 at [37].
14 CA judgment, above n 2, at [27].
15 At [30]–[33].
16 At [42].
17 At [44]–[45]. The applicant's counsel in the Court of Appeal accepted this.
18 *Momoisea v R* [2019] NZCA 528.
19 At [34]–[38], citing *Akash v R* [2017] NZCA 122 at [15]; *Shailer v R* [2017] NZCA 38, [2017] 2 NZLR 629 at [76]; *Cummings v R* [2016] NZCA 509 at [96]; *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602 at [42]; and *Lackner v R* [2016] NZCA 29 at [7].
20 *Momoisea v R* [2020] NZSC 19 (footnotes omitted).

> relating to the application of the approach in *Hessell v R* to guilty pleas in a case under s 104 must be that it would be "manifestly unjust" not to apply that approach. That argument has insufficient prospects of success to justify a grant of leave. The only issue for the Court in this case would accordingly be whether there should have been a credit for the plea and, if so, how much. That does not raise any issue of principle.

[13] The applicant wishes to advance on appeal the same two issues that were identified by Kós P in his minute, namely the level of discount for a guilty plea in a s 104 case and the level of discount for personal characteristics. It is argued that both are points of public importance.[21] It is also argued that a substantial miscarriage of justice will arise if leave is not given.[22]

[14] We accept that the question of the level of discount for a guilty plea in a s 104 case is an issue that may be worthy of the grant of leave. But there is, as the Court of Appeal identified, a real issue as to whether it truly arises in the present case. The applicant's counsel in the Court of Appeal accepted that the starting point of an MPI of 18–19 years was appropriate and we do not see an argument to the contrary as having sufficient prospect of success to justify a further appeal. In effect, the issue reduces to the question as to whether the level of discount was sufficient in the present case, which, as this Court identified in *Momoisea*, does not raise any issue of principle. We would also be required to address the issue of principle that the applicant wishes to raise in a case in which it has not been addressed by the Court of Appeal, which we see as undesirable.

[15] There is also a real question as to whether the issue of the level of discount for personal characteristics arises in this case, given the doubt about whether there is sufficient link between the personal characteristics of the applicant and the murder. Both the High Court and the Court of Appeal (in the latter case, with the benefit of the additional report from Dr Duff) considered that a sufficient link was not established.[23] In light of those concurrent findings, we do not consider that the point the applicant wishes to raise has a proper factual footing. Nor do we consider that a miscarriage of justice will arise if leave is not given on this ground.

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21 Senior Courts Act 2016, s 74(2)(a).
22 Section 74(2)(b).
23 Sentencing remarks, above n 1, at [18]; and CA judgment, above n 2, at [30]–[31].

[16] We do not consider that the criteria for leave to appeal are met in this case.

[17] The application for an extension of time to apply for leave to appeal is granted, but the application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent