

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 71/2021
[2021] NZSC 116**

BETWEEN BENNY MILES MURAAHI
Applicant

AND THE QUEEN
Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: I A Jayanandan for Applicant
M L Wong for Respondent

Judgment: 13 September 2021

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Under the three strikes regime, the first time a person is convicted of a “serious violent offence”¹ (a stage-1 offence) the offender is sentenced in the ordinary way but receives a “first warning” about the operation of the regime.² If the offender is then convicted of another serious violent offence, that offence counts for the purposes of the regime as a stage-2 offence. For offending other than murder, the offender is sentenced in the ordinary way, but if the judge imposes a long-term determinate sentence of imprisonment, the judge must order that the offender serve the full term without parole.³ The judge must also give a “final warning” about the consequences of committing a further qualifying offence.⁴ If the offender then commits a further

¹ As defined in s 86A of the Sentencing Act 2002.

² Section 86B.

³ Section 86C(4)(a).

⁴ Section 86C(1).

serious violent offence (a stage-3 offence) the High Court must sentence the offender to the maximum term of imprisonment prescribed for the offence.⁵ The warnings referred to are given orally but must be “recorded”.⁶

[2] Sections 86B(4) and 86C(7) of the Sentencing Act require that a written notice setting out the consequences of committing further serious violent offences (a written notice of consequences) must be served on an offender convicted of a stage-1 or stage-2 offence. Those sections do not explicitly provide that liability to second and third strike consequences only applies where a written notice of consequences was given in respect of relevant earlier stage-1 or stage-2 offending.

[3] On 15 October 2010, the applicant was sentenced to three and a half years’ imprisonment for aggravated robbery committed in August 2010, a qualifying serious violent offence.⁷

[4] On his release, he committed a further aggravated robbery. On 19 November 2014, he was sentenced to four years’ imprisonment to be served without parole.⁸ The four-year sentence represented a discount to what he would, but for the three strikes regime, have been sentenced to; this to take into account that he would not be eligible for parole.⁹

[5] On his release from this sentence, he committed two more aggravated robberies. When sentencing him in the High Court, Peters J treated him as a stage-1 offender.¹⁰ She concluded that second and third strike consequences applied only if the earlier strike offences had resulted in both a recorded oral warning and service of the written notice of consequences.¹¹ She found that there was insufficient evidence that this had occurred in 2010 and 2014.¹²

⁵ Section 86D(2). If the offender is convicted of murder as a stage-2 or stage-3 offence, s 86E applies instead.

⁶ Sections 86B(1)–(3) and 86C(1)–(3).

⁷ *R v Muraahi* DC Manukau CRI-2009-092-20647, 15 October 2010.

⁸ *R v Muraahi* DC Manukau CRI-2014-092-4111, 19 November 2014.

⁹ At [19].

¹⁰ *R v Muraahi* [2020] NZHC 346.

¹¹ At [18] and [20].

¹² At [35].

[6] The Court of Appeal granted leave to appeal on a question of law under s 296 of the Criminal Procedure Act 2011.¹³ Following further evidence, it concluded that:

- (a) An oral warning had been given by the sentencing Judge in respect of the 2010 conviction (and properly recorded as having been given)¹⁴ and a notice of consequences had been served on the applicant.¹⁵
- (b) An oral warning had been given in respect of the 2014 conviction (and properly recorded as having been given)¹⁶ and the applicant had signed a document confirming that he had been served with a notice of consequences.¹⁷
- (c) Second and third strike consequences apply even if a written notice of consequences had not been served in respect of earlier stage-1 or stage-2 offending.¹⁸
- (d) The High Court Judge was therefore wrong not to treat the applicant as a third strike offender.¹⁹

The Court, however, chose not to resentence the applicant.²⁰

[7] The applicant now seeks leave to appeal. He argues that second and third strike consequences apply only where, in respect of the qualifying convictions, written notices of consequences were provided, in addition to the recorded oral warnings. He also argues that there was insufficient evidence for the Court of Appeal to conclude that the applicant had received both warnings on both occasions.

¹³ *R v Muraahi* [2021] NZCA 214 (French, Brown and Clifford JJ) at [4] and [9].

¹⁴ At [23]–[24].

¹⁵ At [49]–[50].

¹⁶ At [28] and [51]–[52].

¹⁷ At [28].

¹⁸ At [82].

¹⁹ At [82].

²⁰ At [83].

[8] There have been decisions holding that service of a written notice of consequences is necessary to trigger second and third strike consequences.²¹ So it may be that the applicant's challenge to this aspect of the Court of Appeal decision is arguable, although at first blush its analysis of the legislative scheme seems convincing. It is, however, perfectly clear that oral warnings were given and recorded, and written notices of consequences served, in respect of his stage-1 and stage-2 convictions. Further, his sentence as a first strike offender in respect of the last set of offences was not interfered with by the Court of Appeal. As will be apparent, we do not see the evidential issue raised by the applicant as raising issues warranting reconsideration in this Court.

[9] For the reasons given, it is not necessary in the interests of justice to hear the proposed appeal. We do not see the point of law as arising given the findings of fact of the Court of Appeal and the fact that the applicant was not resentenced.²² As well, there has plainly been no miscarriage of justice.²³

Solicitors:
Crown Law Office, Wellington for Respondent

²¹ See *R v Allen* [2018] NZDC 14972, [2019] DCR 227 at [35]; *R v Patel* [2018] NZHC 2946 at [16]; and *R v King* [2019] NZHC 537 at [41] and [44].

²² Senior Courts Act 2016, s 74(2)(a).

²³ Section 74(2)(b).