

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 23/2021  
[2021] NZSC 40

BETWEEN                      STEVEN ROBERTSON  
   Applicant  
  
AND                              THE QUEEN  
   Respondent

Court:                      Glazebrook, O'Regan and Ellen France JJ

Counsel:                  A F Pilditch for Applicant  
   M R L Davie for Respondent

Judgment:                10 May 2021

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**JUDGMENT OF THE COURT**

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- 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.**
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**REASONS**

**Introduction**

[1]     The applicant was found guilty, after a judge-alone trial before Katz J, of 38 charges arising out of fraudulent trading on behalf of clients and taking funds for fictitious shareholdings.<sup>1</sup> The net loss to the victims of this offending over the approximately six-year period was assessed at the time of sentencing to be

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<sup>1</sup>     *R v Robertson* [2019] NZHC 2032. The applicant was discharged on three counts and found not guilty on another six counts.

approximately NZD 1.2 million and AUD 271,200.<sup>2</sup> Most of the 22 victims were elderly and either retired or approaching retirement.

[2] The applicant was sentenced to a term of six years and eight months' imprisonment and a minimum period of three years and four months' imprisonment (MPI) was imposed.<sup>3</sup>

[3] The applicant appealed unsuccessfully against sentence to the Court of Appeal.<sup>4</sup> He now seeks leave to appeal out of time to this Court. The applicant wishes to argue no MPI should have been imposed. There is no challenge to the term of six years and eight months' imprisonment.<sup>5</sup>

### **The proposed appeal**

[4] The applicant says the proposed appeal raises questions about the interpretation of s 86(2) of the Sentencing Act 2002. Section 86(2) provides that an MPI may be imposed if the court is satisfied that the period before which the offender would otherwise be eligible for parole is "insufficient" for any of the stated purposes.<sup>6</sup> The applicant says first that there is a question as to the scope of s 86(2); in particular, whether, given the legislative history, it was intended to increase the cohort of offenders who could and would be made subject to MPIs, thereby altering the status quo for those who, like the applicant, had not committed crimes of serious violence. Second, the applicant submits there is a question about the use of MPIs where an offender poses little or no risk to the community and whether s 86(2) should principally be applied in the interests of community safety and protection.

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<sup>2</sup> *R v Robertson* [2019] NZHC 2773 (Katz J) [sentencing remarks] at [16(a)]. The respondent's submissions note that the victims may recover an undetermined sum from receivers or liquidators. At [37].

<sup>3</sup> *Robertson v R* [2020] NZCA 218 (Gilbert, Wylie and Muir JJ) [CA judgment].

<sup>4</sup> The "trading on behalf of" behaviour gave rise to 23 convictions of theft by a person in a special relationship (Crimes Act 1961, ss 220 and 223(a)); the transfers for fictitious shareholdings gave rise to 11 convictions of obtaining by deception (Crimes Act ss 240 and 241(a)); and, in addition, stealing money from clients' credit card accounts gave rise to four convictions of dishonestly using a document (Crimes Act, s 228(1)(b)). The maximum penalty for all of these offences is seven years' imprisonment.

<sup>6</sup> Generally speaking, they are to hold the offender accountable for the harm done by the offending; to denounce the conduct; to deter the offender or other persons from committing the same or a similar offence; and to protect the community from the offender.

[5] The applicant says these questions are important because MPIs are routinely applied. His contention is that on the analysis he advances, where MPIs are applied to offenders posing no risk to the community, the effect is arbitrary because the MPI is imposed beyond the intent of the provision.

[6] As the respondent submits in opposing leave, the text of s 86 does not draw a distinction between violent and other offenders. The essence of the applicant's argument is accordingly that such a distinction would reflect a purposive interpretation of the section.

### **Our assessment**

[7] We consider the proposed appeal has insufficient prospects of success to justify granting leave to appeal. In any event, as the applicant accepts, these issues were not squarely addressed in the appeal to the Court of Appeal. Rather, the appeal focussed on the justification for the imposition of the MPI in the applicant's case. The absence of any consideration of the issues by the Court of Appeal also points against leave being granted.<sup>7</sup>

[8] Nor, on the material before us, is there a risk of a miscarriage of justice arising out of the Court of Appeal's assessment of the imposition of an MPI in this case. In addressing the MPI, the Court of Appeal noted the sentencing Judge took the view that the first three of the four purposes identified in s 86(2) were engaged.<sup>8</sup> Further, the Court said there was no indication the Judge had "imposed the MPI mechanistically or as a matter of routine".<sup>9</sup> Finally, the Court of Appeal rejected the argument that, based on comparable cases, no MPI was appropriate here.<sup>10</sup>

### **Result**

[9] An explanation is provided for the delay in filing the application for leave to appeal. The application for an extension of time to apply for leave to appeal is granted.

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<sup>7</sup> See *Devoy v R* [2017] NZSC 164 at [5].

<sup>8</sup> CA judgment, above n 4, at [20].

<sup>9</sup> At [21].

<sup>10</sup> At [22]–[28], discussing *Mount v R* [2015] NZCA 489 and *R v Scott* [2017] NZHC 2510.

The criteria for leave to appeal not having been met, the application for leave to appeal is dismissed.<sup>11</sup>

Solicitors:

Doug Cowan Barristers & Solicitors, Auckland for Applicant  
Crown Law Office, Wellington for Respondent

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<sup>11</sup> Senior Courts Act 2016, s 74(2)(a) and (b).