



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

DANIEL CLINTON FITZGERALD v R

(SC 67/2020) [2021] NZSC 131

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Suppression

Please note that publication of the name, address, occupation or identifying particulars of the complainant is prohibited by s 203 of the Criminal Procedure Act 2011.

Introduction

The Sentencing Act 2002 was amended in 2010 to incorporate a “three strikes” regime, providing mandatory sentencing for certain categories of repeat offenders. This appeal concerns the application of that regime in circumstances where the resulting sentence on conviction for a “third strike” offence is so disproportionately severe as to breach s 9 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights).

Background

The appellant, who suffers from long-standing and serious mental illness, committed a third strike offence in December 2016 when he approached a woman on Cuba Street, Wellington, and attempted to kiss her mouth. She moved her head so that he kissed her cheek instead. The appellant was convicted of indecent assault in respect of this conduct. Because this was a third strike offence, he was sentenced in the High Court under s 86D(2) of the Sentencing Act to seven years’ imprisonment (the maximum sentence for indecent assault), despite the fact that the offending was at the lower end of the range for the offence, and notwithstanding the link between his mental health condition and the offending.

The appellant applied for a discharge without conviction for the offence of indecent assault under s 106 of the Sentencing Act, which provides that “the court may discharge the offender

without conviction, unless by any enactment applicable to the offence the court is required to impose a minimum sentence". The High Court Judge held that a discharge without conviction was not available for third strike offences, as the Court was required to impose a minimum sentence.

The appellant appealed his conviction and sentence to the Court of Appeal, arguing that the Court could and should discharge him without conviction, on the basis that to do otherwise would be inconsistent with s 9 of the Bill of Rights. Section 9 affirms that everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment. The majority of the Court of Appeal agreed with the High Court Judge that a discharge without conviction was not available for third strike offences.

Issues on appeal

Leave to appeal was granted on the question of whether the Court of Appeal was correct to find that s 106 of the Sentencing Act did not apply to the appellant. An alternative argument was raised during the hearing, after which the Court amended the grant of leave. The question added by that amendment was whether s 86D(2) of the Sentencing Act should be interpreted as subject to a limitation that the requirement to sentence an offender to the maximum sentence does not apply where to do so would constitute a breach of s 9 of the Bill of Rights and New Zealand's international obligations.

It was common ground between the parties that the sentence imposed on the appellant was disproportionately severe, in breach of s 9. The appellant argued that interpreted in light of the Bill of Rights, a discharge without conviction was available for third strike offences. In the alternative, the appellant submitted that it is possible, through ordinary methods of statutory interpretation, to read a proviso into s 86D(2) that the maximum sentence need not be imposed where the sentence would be in breach of s 9 of the Bill of Rights.

The Crown argued that the clear wording of s 106 excludes the discretion to discharge without conviction for third strike offences, and that to find otherwise would override the purpose of the three strikes regime and create perverse outcomes. As to the s 86D(2) issue, it said that a rights-consistent interpretation of s 86D(2) is not available due to the clear statutory language and purpose.

Decision

By majority, comprising Winkelmann CJ, Glazebrook, O'Regan and Arnold JJ, the Supreme Court has allowed the sentence appeal.

Winkelmann CJ, Glazebrook, O'Regan and Arnold JJ agreed that the appellant's sentence was so disproportionately severe as to breach s 9 of the Bill of Rights, and that this right is not subject to reasonable limits under s 5. They held that Parliament did not intend, in enacting the three strikes regime, to require judges to impose sentences that breach s 9 of the Bill of Rights and New Zealand's international obligations. They considered it possible, and therefore necessary, to interpret s 86D(2) so that it does not require the imposition of sentences that would breach s 9. Glazebrook, O'Regan and Arnold JJ held that where the maximum sentence produced by s 86D(2) would breach s 9, an offender should instead be sentenced in accordance with ordinary sentencing principles. Winkelmann CJ agreed that ordinary sentencing principles will apply, but considered that s 86D(2) adds a sentencing

principle that recidivism by those caught by the regime is to be viewed as very serious and worthy of a stern sentencing response.

William Young J was of the view that the language, scheme and purpose of the three strikes regime do not allow for the interpretation reached by the majority. He would construe s 86D(2) as not being subject to any exception.

All members of the Court dismissed the appellant's application for a discharge without conviction. Glazebrook, O'Regan and Arnold JJ held that in the rare cases where the three strikes regime will not apply because the maximum sentence required under it would breach s 9, a discharge without conviction will be available as part of the usual suite of sentencing options, including in this case. For the purposes of the appeal, it was unnecessary for them to determine whether a discharge without conviction would be available where a third strike sentence does not breach s 9.

Winkelmann CJ considered that the discharge without conviction jurisdiction is available for offenders found guilty of a third strike offence, applying the usual principles for the exercise of that discretion, whether or not the resulting sentence would breach s 9 of the Bill of Rights. However, she acknowledged that usually, third strike offending viewed in its overall circumstances will place it outside the category of case where a discharge without conviction would be appropriate. She found that the present case came very close to being one of the rare third strike cases in which a discharge would be appropriate, and might have been such a case were it not for public safety concerns.

William Young J considered that the power to discharge without conviction is not available where the three strikes regime applies because the regime imposes a minimum sentence and, even if it were available, a discharge would not be appropriate in this case.

Based on the conclusion of the majority on the sentence appeal, the matter is remitted to the High Court so that the appellant can be re-sentenced in accordance with ordinary sentencing principles, taking into account his significant mental health issues.

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