NOTE: PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA755/2021
[2022] NZCA 112

BETWEEN	ANARU MORGAN Applicant
AND	THE QUEEN Respondent

Court:	Kós P, Woolford and Dunningham JJ
Counsel:	H T Young for Applicant C A Brook for Respondent
Judgment: (On the papers)	6 April 2022 at 9 am

JUDGMENT OF THE COURT

The application for leave to appeal is declined.

REASONS OF THE COURT

(Given by Kós P)

[1] The three-strikes sentencing regime[1] is likely to be repealed by Parliament. A Bill to that effect is before the House.[2] If enacted in its present form it would come into force on 1 July 2022, but without retrospective effect. Unless revised, those sentenced prior to 1 July will remain subject to the three-strikes regime.

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1 Sentencing Act 2002, ss 86A–86I.
2 Three Strikes Legislation Repeal Bill 2021 (79–1).

[2] Consider, now, Mr Morgan. In December 2021 he was convicted of one charge of unlawful detention for the purposes of sexual connection following a High Court jury trial.[3] The maximum sentence for that offence is 14 years' imprisonment. Mr Morgan faces: (1) the mandatory imposition of that sentence, unless that sentence is so disproportionately severe as to breach s 9 of the New Zealand Bill of Rights Act 1990;[4] and (2) mandatory denial of parole, unless that order would be manifestly unjust.[5] That is because he has two prior convictions for indecent assault and was on a third-strike warning at the time he last offended.

[3] Should Mr Morgan's sentencing be adjourned, so that — if the Bill passes — he may be sentenced under a more tolerant statutory regime? There is no other justification put forward for delaying imposition of sentence.

[4] Mander J held Mr Morgan must be sentenced in the ordinary way, according to the law as it now stands. He declined Mr Morgan's application for adjournment of sentencing.[6] Mr Morgan seeks leave to appeal to this Court.

The offending

[5] By arrangement Mr Morgan met a prostitute at her motel room. She wanted payment in cash; Mr Morgan had only a credit card. She tried to get him to leave, to obtain cash, but he refused and there was a struggle. She then submitted to Mr Morgan's demands, saying "Okay, I do for you, but you not hurt me". A jury found Mr Morgan guilty of unlawful detention for the purpose of sexual connection, but not guilty of unlawful sexual connection and sexual violation.

[6] Mr Morgan had received a stage-one warning in July 2013, and a stage-two warning in March 2016, in each case on charges upon conviction for indecent assault. The present offence is a "serious violent offence" and therefore constitutes a stage-three offence under the statutory three-strikes regime.[7] By virtue of s 86D of the

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3 Crimes Act 1961, s 208(b).

4 Sentencing Act, s 86D(2); and *Fitzgerald v R* [2021] NZSC 131, (2021) 12 HRNZ 739 at [135] and [138]–[140] per Winkelmann CJ, [231] per O'Regan and Arnold JJ and [250]–[251] per Glazebrook J.

5 Sentencing Act, s 86D(3).

6 *R v Morgan* [2021] NZHC 3352 [High Court judgment].

7 Sentencing Act, s 86A(34).

Sentencing Act 2002, the Court will have to sentence Mr Morgan for the maximum term of 14 years' imprisonment, and order him to serve the sentence without parole, unless such an order would be manifestly unjust. In *Fitzgerald v R* the Supreme Court explained that s 86D does not compel imposition of a sentence so disproportionately severe as to breach s 9 of the New Zealand Bill of Rights Act 1990.[8] Relief on the basis of *Fitzgerald* is not inevitable; indeed, it is likely to be exceptional. Whether it may avail Mr Morgan is presently unknown.

Legislation and legislative reform

[7] The three-strikes regime has been intensely controversial in this country. In October 2021 the present Government announced its intention to repeal that regime. The Three Strikes Legislation Repeal Bill 2021 was introduced into Parliament on 11 November 2021. The Explanatory Note relevantly states:[9]

> The Government's objectives in repealing the law are to remove the mandatory sentencing requirements that result in excessive and disproportionate sentence outcomes by preventing Judges from taking the individual circumstances of the offender and the offending into account.
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> …
>
> Repealing the three strikes law will revert the sentencing process for strike offences to standard sentencing practices by allowing the Judge to reach an appropriate outcome on a case-by-case basis. This Bill expressly excludes any entitlement to compensation relating to the impacts of the three strikes law, and no transitional arrangements for those currently serving sentences of imprisonment for a strike offence are included.

The Bill is now before a Select Committee. Its report is due on 17 May 2022.

[8] Introducing the Bill, the Minister of Justice, the Hon Kris Faafoi, said:[10]

> … there have been some perverse outcomes, but we acknowledge that there are victims in this and there will be no revictimisation of those people during this process, because there is no retrospective aspect of this bill.

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8 *Fitzgerald v R*, above n 4, at [135] and [138]–[140] per Winkelmann CJ, [231] per O'Regan and Arnold JJ and [250]–[251] per Glazebrook J.

9 Three Strikes Legislation Repeal Bill 2021 (79–1) (explanatory note) at 1.

10 (16 November 2021) 756 NZPD 6219.

Later in his speech he reaffirmed, "there is no retrospectivity within this piece of legislation", and:[11]

> The principle of people being prosecuted and sentenced under the law as it stood at the time still holds true. That will not change, and under this legislation no one will have their sentences reconsidered.

[9] The government has however invited the Select Committee to consider whether some restrospectivity should be added to the Bill. Whether that occurs remains a matter for Parliament. If passed, the Bill presently would come into effect on 1 July 2022. Whether that, too, occurs is also a matter for Parliament.

The law

[10] Any change in the law, whether common law or by legislation, has the potential to produce arbitrary effect. People whose rights have already been adjudicated may feel aggrieved that — if their appeal rights are spent or the legislation is non-retrospective — they do not gain the benefit of the change. Correspondingly, in a civil context at least, their opponent does not suffer the disadvantage of change. Finality applies.

[11] It is helpful to start with *common law* change in a criminal context. Although judicial decisions speak retrospectively, as well as prospectively, a person whose conviction or sentence might be mitigated if a later judgment in another case is applied, cannot rely upon it if their appeal rights are spent.[12] For them, their prior judgment or sentencing is final. If their appeal rights are not spent, however, then they may be able to rely on it. When this Court issues a guideline judgment, the effect of which may be to alter sentencing scales generally for particular offences, the norm is to provide that it is to be applied to: (1) all sentencings that take place after its issue regardless of when the offending took place; and (2) sentences that have already been imposed, if an appeal against the sentence had been filed before the date the judgment was

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11 (16 November 2021) 756 NZPD 6219–6220.

12 *Cheung v R* [2021] NZCA 175, [2021] 3 NZLR 259 at [31]–[33]. See also *Taylor v R* [2019] NZCA 498, [2019] 2 NZLR 38 at [9]–[15]; and *R v Knight* [1998] 1 NZLR 583 (CA).

delivered and the application of the judgment would result in a more favourable outcome to the appellant.[13]

[12] In the case of *legislative* change that is still impending and not yet enacted, the courts proceed with great care because Parliament has not yet spoken authoritatively. In *Ngāti Whātua Ōrākei Trust v Attorney-General* certain properties were to be transferred to iwi by future Treaty-settlement legislation.[14] In the Supreme Court, Elias CJ observed:[15]

> Parliament speaks to the courts only through enacted legislation. Whether the enactment proposed will proceed and, if so, the form it will take is uncertain because it is a matter for Parliament. Just as the executive cannot bind itself by contract to introduce and pass legislation, it cannot properly give any assurance to the court that the legislation it proposes will be passed.
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> …
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> The constitutional functions of the courts are not enlarged by this approach. Rights in issue in the courts may always be changed by legislation. The prospect does not deflect the courts from carrying out their present responsibilities. Nor are they deflected by statements of government policy that legislative change will be sought. Such statements cannot mark out no-go areas for the courts.

[13] That statement of constitutional principle applies whether the context is civil (as there) or criminal (as here). We turn now to criminal legislation that has been enacted, but not yet entered into force. We emphasise that is not the context we confront here.

[14] There are many cases to the effect that a prosecutor may not of course prosecute on the basis of legislation not yet in force at the time of the alleged offending.[16] Relatedly, a defendant may not rely on a defence made available by

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13 See, for example, *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [10(p)] and [187]–[188]; and *R v Fatu* [2006] 2 NZLR 72 (CA) at [44]. A similar approach was taken to the structural change to sentencing methodology made in *Moses v R* [2020] NZCA 296; [2020] 3 NZLR 583: see *Cheung v R*, above n 12, at [38]–[49].

14 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.

15 At [114] and [116] (footnotes omitted).

16 See, for example, *Beazer v Wellington City Council* [2009] NZAR 689 (HC); aff'd [2010] NZCA 14, [2010] NZAR 188. However, the infringement and reminder notices in *Beazer*, which referred to the provisions of legislation not yet in force at the time of the alleged offending, were found to have stated sufficiently the particulars of the offending conduct such that failure to specify the correct statutory provisions did not render them a nullity. The defects in the notices could be cured by s 204 of the Summary Proceedings Act 1957: at [34]–[36]. See also *White v R* [2014] EWCA Crim 714, [2014] 2 Cr App R 194.

legislation not yet in force. In *R v Director of Public Prosecutions, ex parte Kebilene* an applicant for judicial review could not base a plea of legitimate expectation on a convention provision because the legislation giving that convention status in English law was not yet in force.[17] Lord Steyn said:[18]

> There is a clear statutory intent to postpone the coming into effect of central provisions of the Act. A legitimate expectation, which treats inoperative statutory provisions as having immediate effect, is contradicted by the language of the statute.

[15] Nor may a prosecutor seek to adjourn trial to take advantage of a legislative change that alters proof. In *R v Walsall Justices*, *ex parte W*, Justices of the Peace had adjourned a case for a day to take advantage of new legislation that abolished the requirement of corroboration of the evidence of a child witness, but which came into effect the day after trial was to begin.[19] The prosecution sought the adjournment, indicating that otherwise it would not be able to offer any evidence against the defendant. Granting judicial review, the Divisional Court held the justices had in effect passed an adverse qualitative judgment on the existing law as at the date of trial. Saville J said:[20]

> The fact that [the justices] did so because they preferred the law as it would be on the following day seems to us to be neither here nor there — for the fact remains that the trial did not proceed because the justices felt that the law in force on the day fixed for it would not do justice. That in our view is not a legitimate basis for ordering an adjournment.

The Court noted the adjournment might have been legitimate if the legislative change merely created a different mode of trial or similar neutral procedural advantage:[21]

> In the present case, however, the change is with regard to what was a fundamental and mandatory rule of law — until 12 October 1988 a defendant could *not* be convicted on the uncorroborated and unsworn evidence of a child.

[16] To summarise in broad terms, and absent statutory provision otherwise, the rule of law requires that courts apply: (1) the substantive criminal law governing the

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17 *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326 (HL).
18 At 368.
19 *R v Walsall Justices, ex parte W* [1990] 1 QB 253.
20 At 260.
21 At 260–261 (original emphasis).

offence as at the date of the offending;[22] and (2) the procedural criminal law as it exists at the date of hearing. What then of (3) sentencing? Three points might usefully be made about that.

[17] First, although an offender is sentenced according to the law as at the date of sentence,[23] the Sentencing Act and New Zealand Bill of Rights Act together provide that if the penalty prescribed has increased since the date the offence was committed, the lesser penalty will apply unless the legislation has clear retrospective effect.[24] In other words, sentencing occupies a hybrid state between the rules applicable to the offending (date of offence) and the rules of procedure (date of hearing).

[18] Secondly, this Court has however held that a sentencing court may take into account enacted legislation not yet in force, in mitigation of sentence.[25] In *R v O'Brien* the appellant had pleaded guilty to possession of cannabis for supply.[26] He was sentenced to 10 years' imprisonment at a time when the maximum sentence would have been 14 years. The Court (Wild CJ, McCarthy P and Richmond J) had regard to the reduced maximum sentence for the same offence under the newly enacted Misuse of Drugs Act 1975, even though it was not yet in force.[27] The Court observed:[28]

> Even though the new statute, in the form in which it was passed, had not been introduced into Parliament at the date of the offences in question and even now is not to come into force until a date to be appointed by Order in Council, the court is of opinion that it cannot ignore its terms in dealing with this appeal. The fact must be recognised that Parliament has decided that the maximum punishment for offences in relation to cannabis plant, which is the narcotic involved here, shall be imprisonment for a term not exceeding eight years. That being the case the point made by Crown counsel does not arise.

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22 See also Legislation Act 2019, ss 32–36; *R v Fisher* [1969] 1 WLR 8 (CA); and Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 789-791.

23 *Robinson v R* [2016] NZCA 188 at [21]. See also Sentencing Act, s 5(3).

24 Sentencing Act, s 6(1); and New Zealand Bill of Rights Act 1990, s 25(g). See also *R v Pora* [2001] 2 NZLR 37 (CA) at [23]–[25]. But compare Legislation Act, s 12.

25 See *Burrows and Carter Statute Law in New Zealand*, above n 22, at 791.

26 *R v O'Brien* [1976] 1 NZLR 513 (CA). In a comparable civil context, see *Kain v Wynn Williams & Co* [2012] NZCA 563, [2013] 1 NZLR 498, at [54]–[55].

27 So that the then-equivalent of s 6(1) of the Sentencing Act was not engaged, giving the benefit of the reduced penalty at the time of sentencing: Criminal Justice Act 1954, s 43B.

28 *R v O'Brien*, above n 26, at 517.

[19] Thirdly, a court ought not adjourn if the sole reason for doing so is to apply a different statutory regime applying to sentencing at a later time. In *Arthur v Stringer* the defendant, aged 20 years, had been sentenced to four months' detention for assaulting police officers who had been attempting to arrest him.[29] He appealed that sentence. By the time his appeal came before the Crown Court, he was 21 years of age and eligible for imprisonment. The Crown Court accepted that its powers were limited to those of the magistrates at the time of sentence, but considered the prohibition against imposing a sentence of imprisonment on a 20-year-old could be avoided by purporting to adjourn sentence until he had attained the age of 21 years. It did so and substituted a term of four months' imprisonment suspended for 18 months. In this instance, the notional adjournment worked to the defendant's advantage. But now the prosecution appealed, on the basis the new sentence imposed was unlawful — a position supported by counsel for the defendant. Allowing the prosecutor's appeal, Watkins LJ observed:[30]

> It is implicit, in my judgment, that the discretion which is vested in justices … to adjourn sentence be exercised judicially. It cannot be said to have been exercised judicially if it was done for no other purpose than to ensure that by the time sentence be passed a defendant has increased in age to that of 21 years so that the court be clothed with the power of passing a sentence of imprisonment. It would, in my view, be an abuse of the power to order an adjournment for that purpose; for, as I have said already, when first coming before the court for sentence after conviction, the defendant, in this instance, was below the age when he could have been imprisoned. Therefore it was, in all the circumstances, unlawful of the Crown Court to purport to exercise a power of adjournment so as to clothe them with the right, as they thought they had, to pass terms of imprisonment upon this defendant.

[20] To adjourn in order to apply a more tolerant statutory sentencing regime applicable at a later date is to pre-empt a choice Parliament has made by not giving the later enactment retrospective effect. In doing so it offends the principles stated pithily by Lord Steyn in *Kebilene* in the passage quoted at [14] above.

The application of the law to this case

[21] Our view for the purposes of the present application is that the Judge was right to refuse adjournment on this basis. For that reason, we consider the proposed appeal

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29 *Arthur v Stringer* (1986) 84 Cr App R 361 (QB).

30 At 367. The Court ended up imposing a conditional discharge by way of sentence.

lacks merit, so that leave to appeal should be declined. Formally, however, the argument remains one Mr Morgan may revisit on a sentence appeal.

[22] Mr Morgan confronts two insuperable difficulties here.

[23] The first is that the more tolerant sentencing regime he seeks to rely upon is neither enacted nor in force. For the reasons set out at [12] and [13] above, courts should not act in anticipation of legislation as yet unpassed. Nor should they pre-empt Parliament's decision by shunting sentencings into a sort of siding to relieve some defendants (but not others) from non-retrospectivity, if ultimately that is Parliament's will. Parliament must make the decision whether to repeal the current sentencing framework and, if so, whether to do so retrospectively. The choices before Parliament are stark ones, but they are Parliament's stark choices.

[24] The second difficulty is that the power to adjourn, under s 167 of the Criminal Procedure Act 2011, is discretionary in nature. The power, while apparently untrammelled, may only be exercised for good reason, with the determinant being whether an adjournment is in the interests of justice.[31] For the reasons given above, postponement of a fixture purely because a qualitative preference for a potentially more benign legislative regime is not such a reason. But quite apart from that, the consequence of the power being discretionary is that a higher threshold for appellate reversal applies. As this Court observed in *Parker v R*:[32]

> A degree of appellate deference applies. The discretionary decision must be wrong, fundamentally, in one or more of these four respects: the Judge made an error of law or principle, failed to take into account some relevant matter, took into account an irrelevant matter, or was plainly wrong. If not, the first instance decision should stand and appellate courts ought not interfere with it.

No such error is demonstrated here.

[25] There is no other legitimate basis for adjournment of sentencing. Without such a reason, sentencing must proceed on the basis of the law as it now stands, albeit the three-strikes regime may end in three months' time.

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31 *Mizsey v Police* [2017] NZHC 3130 at [5], citing *Gray v Thom* (1997) 10 PRNZ 373 (HC) at 377.
32 *Parker v R* [2020] NZCA 502, (2020) 29 CRNZ 536 at [30] (footnote omitted).

[26] The deeply unfortunate consequence, for Mr Morgan and for others, is for Parliament to weigh.

Result

[27] The application for leave to appeal is declined.

Solicitors:
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Crown Law Office, Wellington for Respondent