IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 148/2021
[2022] NZSC 41

BETWEEN	DYLAN EDWARD COLEMAN Applicant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: H G de Groot and T W R Lynskey for Applicant
B C L Charmley for Respondent

Judgment: 7 April 2022

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Mr Coleman was convicted of indecent assault offences in 2011 and of sexual exploitation of a person with a significant impairment in 2014. Since then he has committed several more minor offences.

[2] The Chief Executive of the Department of Corrections (CE) sought an extended supervision order (ESO) for Mr Coleman, which was refused by the District Court on the basis that although there was "a pervasive pattern of sexual

offending and sexualised behaviour", there was no pervasive pattern of serious sexual offending.[1]

[3] On appeal by the CE, the Court of Appeal overturned that decision and imposed a five year ESO.[2] The Court of Appeal considered the 2011 and 2014 offending serious and pointed to a pattern of Mr Coleman forcing himself on young women in order to have sex irrespective of their objections.[3] The Court considered that Mr Coleman has a pervasive pattern of serious sexual offending and is plainly at high risk of committing serious sexual offending in the future.[4] The Court considered an ESO for a period of five years to be in reasonable proportion to the importance of protecting the community from the real and ongoing risk of Mr Coleman committing serious sexual offences.[5]

[4] Mr Coleman now seeks leave against the Court of Appeal decision.

The legislation

[5] In imposing an ESO, s 107I(2) of the Parole Act 2002 requires the Court to consider whether:

> (a) the offender has, or has had, a pervasive pattern of serious sexual or violent offending; and
>
> (b) either or both of the following apply:
>
> (i) there is a high risk that the offender will in future commit a relevant sexual offence:
>
> (ii) there is a very high risk that the offender will in future commit a relevant violent offence.

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1 *R v Coleman* [2021] NZDC 7789 (Judge Neave) at [92]. The Judge stated that Mr Coleman's offending whilst under supervision "tends much more to the nuisance level".

2 *The Chief Executive of the Department of Corrections v Coleman* [2021] NZCA 528 (Cooper, Venning and Palmer JJ) [CA judgment] at [42].

3 At [32].

4 At [16] and [35]. The Court applied the test set out in *Kiddell v Chief Executive of the Department of Corrections* [2019] NZCA 171.

5 CA judgment, above n 2, at [38].

The parties' submissions

Applicant submissions

[6] Mr Coleman submits that his case exposes an issue with the current test: in his submission the test places too much weight on future conduct and collapses the statutory distinction between the "pervasive pattern" threshold in s 107I(2)(a) and the "high risk" threshold in s 107I(2)(b)(i) of the Parole Act. He submits that this Court should recast the test for pervasive pattern to remove the emphasis on the prediction of future conduct. He submits that the application of the test in this case led to an erroneous conclusion that there was a pervasive pattern.

[7] As a second ground, Mr Coleman submits that there is ambiguity around what criteria apply to appeals by a CE for an ESO: whether the same standards apply as those that apply to an appeal by the Solicitor-General against sentence.[6]

Respondent's submissions

[8] The CE submits that the test of pervasive pattern is well settled. ESOs are fact specific and any perceived inconsistencies between the application of the test is due to the particular offending histories and individual characteristics. In this case it is clear there was a pervasive pattern.

[9] With regard to the second ground, it is submitted that the Court of Appeal has no discretion to impose a term that is below the minimum period required to mitigate the risk posed.

[10] Finally, it is submitted that there is no risk of a miscarriage of justice as the Court of Appeal was plainly correct to impose the ESO given the ongoing risk to the community posed by Mr Coleman.

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6 Citing *R v Edwards (Note)* [2006] NZSC 52, [2006] 3 NZLR 349 at [9].

Our analysis

[11] Nothing raised by Mr Coleman suggests that the test for pervasive pattern needs modification or that, in his case, the application of the test led to an erroneous conclusion on that point by the Court of Appeal. There is therefore no matter of public or general importance or any risk of a miscarriage of justice.[7]

[12] We accept the submission of the CE in relation to the second ground raised by Mr Coleman.

Result

[13] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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7 Senior Courts Act 2016, s 74(2).