IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 27/2022
[2022] NZSC 68

BETWEEN	BILLY MARK MATARA Applicant
AND	THE QUEEN Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: A J Ellis for Applicant
J E Mildenhall for Respondent

Judgment: 27 May 2022

JUDGMENT OF THE COURT

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.

REASONS

Introduction

[1] In 2016, Mr Matara was living in a boarding house. In the early hours of 7 May 2016, he invited the victim, a fellow resident, onto the deck for a cigarette. There was some conversation but they did not argue. The victim went into the kitchen to make a cup of tea. Mr Matara followed him and shot him twice with a pump-action shotgun. The victim was seriously injured and lucky to survive. He has serious ongoing health issues.

[2] Mr Matara was convicted at trial of attempted murder and was sentenced to 10 years and two months' imprisonment without the possibility of parole in terms of s 86C of the Sentencing Act 2002, one of the "three strikes" provisions.[1]

[3] In 2021, Mr Matara successfully appealed against the High Court's application of s 86C before the Court of Appeal in light of this Court's decision in *R v Fitzgerald* (*Fitzgerald*).[2] The Court substituted a minimum period of imprisonment (MPI) of 40 per cent.[3]

[4] Mr Matara now seeks leave to appeal against the Court of Appeal's judgment on the grounds that Court erred in not also reducing his sentence.

Out of time

[5] Mr Matara's application is several weeks out of time, but an extension of time is not opposed given there is no prejudice to the Crown.

High Court sentencing

[6] The sentencing Judge set a starting point of 10 years' imprisonment.[4] In setting that starting point, she took into account that Mr Matara was likely psychotic at the time of the offending "at least as a result of methamphetamine use, but possibly as a result of some other underlying disorder as well or instead of".[5] The Judge said that, to the extent the psychosis was a result of methamphetamine use, she could not treat it as a mitigating factor.[6] She was prepared to treat the offence as not being pre-meditated in the sense of that being an aggravating factor.[7] She did not, however, see the psychosis as a factor justifying a discount.

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1 *R v Matara* [2017] NZHC 2198 (Courtney J) [HC judgment].
2 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 [*Fitzgerald*].
3 *Matara v R* [2021] NZCA 692 (Miller, Goddard and Katz JJ) [CA judgment] at [78].
4 HC judgment, above n 1, at [18]. This was the starting point put forward on behalf of Mr Matara. The Crown had submitted a starting point of 11 years was appropriate: at [6].
5 At [15]. Mr Matara's sentencing had been adjourned earlier for psychiatric assessment but he had refused to engage with the appointed psychiatrist or with a psychologist: at [14].
6 At [15].
7 At [15].

[7] In setting the starting point, the Judge took into account the unprovoked nature of the attack and that it was only luck and prompt medical attention that saved the victim.[8] Mr Matara did not stop to help. The Judge, however, considered this was linked to pre-meditation and treated it in the same way.[9]

[8] The Judge took into account the use of a deadly weapon, the extreme violence and the fact that the victim was shot twice (the latter as a serious aggravating factor because it made a fatal outcome more likely).[10] The Judge added a modest uplift of two months for previous violent offending.[11] She did not accept there were other mitigating factors.[12]

[9] The Judge said that Mr Matara would have to serve the full sentence (because of s 86C), but if that had not applied, she would have imposed an MPI of 40 per cent.[13]

Court of Appeal judgment

[10] The Court of Appeal held that the additional six year non-parole period[14] is "not justified by reference to any of the statutory purposes of sentencing, and is disproportionate".[15] This was especially the case in light of Mr Matara's mental illness and psychosis at the time of the offending.[16] The Court of Appeal went on to say:[17]

> It is not necessary for us to consider, in this case, whether the unexpressed qualification that must be read into s 86C(4) extends to inconsistency with other provisions of NZBORA, as suggested by O'Regan and Arnold JJ, and whether other NZBORA provisions are engaged in this case. It might be arguable that the three strikes regime discriminates against Mr Matara on the basis of mental disability. It might also be arguable that the non-parole order required by s 86C(4) limits the enjoyment of other rights affirmed by NZBORA (in particular, rights to freedom of movement and freedom of association) in a manner that — because it is not rationally connected to the purposes of sentencing under the Sentencing Act — is not demonstrably justified in a free and democratic society, as required by s 5 of NZBORA.

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8 At [16].
9 At [16].
10 At [17].
11 At [19].
12 At [20].
13 At [20]–[21].
14 Over and above the 40 per cent MPI that would have been imposed by the sentencing Judge had s 86C not applied.
15 CA judgment, above n 3, at [5](a) (footnote omitted).
16 At [74].
17 At [75] (footnotes omitted).

> These issues would require careful consideration after full argument and evidence, possibly involving intervenors.

[11] The Court substituted an MPI of 40 per cent. At the time of the Court of Appeal's consideration of the appeal, Mr Matara had already reached his MPI. The Court rejected a submission that, because Mr Matara had lost the opportunity to apply for parole at the earliest possible opportunity, his conviction should be set aside or a new sentence imposed that would equate to time already served.[18] This was because it was incorrect to assume that Mr Matara would have immediately been granted parole but for the application of s 86C.[19] In addition, Mr Matara's offending was serious and more time could have been needed to address his rehabilitation needs.[20]

[12] The Court said:[21]

> We must impose the sentence that ought to have been imposed, not some other sentence contrived to achieve the result of Mr Matara's immediate release. It would be quite wrong for us to pre-empt the parole process, and risk undermining the focus of the Parole Act on ensuring the safety of the community. Rather, we will impose the sentence that ought to have been imposed on Mr Matara. He can then be considered for parole. Whether he is released on parole, and when, and the conditions on which he is released, will be matters for the Parole Board to determine in the usual way.

Applicant's submissions

[13] Mr Matara seeks to raise the issue of discrimination in the calculation of his sentence. Mr Matara submits there are special considerations that would warrant a further reduction in sentence. In his submission, he has suffered discrimination, being Māori, and also from having mental health issues. He submits that this engages both the New Zealand Bill of Rights Act 1990 (Bill of Rights) and the Human Rights Act 1993.

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18 At [79].
19 At [69].
20 At [79].
21 At [80].

[14] In Mr Matara's submission, the Court of Appeal should have applied the approach of O'Regan and Arnold JJ in *Fitzgerald*,[22] and dealt with this issue by a sentence reduction, that being the Bill of Rights-consistent remedy.

Crown's submissions

[15] The Crown opposes the granting of leave. It says that the 10 year and two months sentence was not challenged in the Court of Appeal. Nor were any Bill of Rights discrimination issues raised. Leave will rarely be granted to pursue grounds of appeal not raised in the courts below.[23] In any event, the three strikes legislation is in the process of being repealed. This Court has previously expressed the view that in such circumstances, leave is generally inappropriate.[24] Finally, Mr Matara is already eligible for parole and any remedy would have no practical effect.

Our assessment

[16] As the Court of Appeal noted, the effect of this Court's decision in *Fitzgerald* is that the offender should be sentenced in accordance with ordinary sentencing principles.[25] That is what the Court of Appeal did in reducing the MPI, taking into account Mr Matara's mental health issues.

[17] Apart from the submission regarding the MPI period elapsing, there was no challenge in the Court of Appeal to the sentence of 10 years and two months. This is understandable, as this part of the sentence was not affected by s 86C.

[18] To the extent Mr Matara now wishes to challenge the general sentencing approach taken in the High Court, we do not consider it appropriate for this Court to deal with the issues Mr Matara seeks to raise for the first time on a second appeal, particularly as evidence would likely be required.[26] In addition, as the Crown points out, Mr Matara is, in any event, eligible for parole and thus there would be little

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22 *Fitzgerald*, above n 2, at [75].
23 *LM v R* [2014] NZSC 9, (2014) 26 CRNZ 643 at [2].
24 *S (SC 119/2016) v R* [2016] NZSC 172 at [7].
25 *Fitzgerald*, above n 2, at [231] per O'Regan and Arnold JJ and at [252] per Glazebrook J.
26 For the avoidance of doubt, we are not to be taken as making any comment on whether or not Mr Matara was subject to discrimination.

practical effect arising out of any sentence reduction. Further, the three strikes legislation is in the process of being repealed. This reduces any general and public importance of the proposed appeal.[27] We therefore do not consider that it is necessary in the interests of justice to hear the appeal.[28]

Result

[19] The application for an extension of time for leave to appeal is granted.

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

Solicitors:
Crown Law Office, Wellington for Respondent

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27 The comments of O'Regan and Arnold JJ in *Fitzgerald*, as discussed by the Court of Appeal (see above at [10]) are related to the three strikes regime.

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