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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 20/2023
[2024] NZSC 2**

BETWEEN DARNELL WILSON LIAI
Applicant

AND THE KING
Respondent

Court: Glazebrook and Kós JJ

Counsel: M J Phelps for Applicant
P D Marshall and T C Didsbury for Respondent

Judgment: 1 February 2024

JUDGMENT OF THE COURT

**The application for an extension of time to apply for leave to
appeal is dismissed.**

REASONS

[1] Mr Liai is serving sentences totalling 11 years and 10 months' imprisonment for serious violent and sexual offending. These were "second-strike" sentences imposed under the now-repealed s 86C of the Sentencing Act 2002. The offending was committed in 2017 while Mr Liai was on parole for serious first-strike offending.

[2] In 2020, the Court of Appeal dismissed his appeal against sentence.¹ In 2023 the Court of Appeal declined to recall that decision, holding that the order requiring

¹ *Liai v R* [2020] NZCA 167 (French, Dobson and Nation JJ).

the sentences be served without parole did not breach s 9 of the New Zealand Bill of Rights Act 1990.²

[3] Mr Liai seeks leave to appeal out of time against the Court of Appeal’s first decision dismissing his appeal against sentence. The two grounds he presents for appeal are:

- (a) whether this Court “should adopt, with any modifications, the criteria identified in *Phillips v R*³ as being appropriate factors to consider in assessing when a disproportionate sentence breached s 9”; and
- (b) whether, in determining an appeal against sentence, this Court is entitled to consider the later Court of Appeal decision declining an application for recall.

Our assessment

[4] On the first ground, Mr Liai invites this Court to offer guidance on the appropriateness of factors identified by the Court of Appeal in *Phillips* as potentially assisting assessment of when a sentence breaches s 9.⁴ He also wishes to contend that access to rehabilitation and reintegrative activities ought also to be factors considered in assessing a s 9 breach.

[5] We do not consider the criteria for leave would be met by this ground. The governing principles by which to assess a breach of s 9 were stated by this Court in *Taunoa v Attorney-General* and *Fitzgerald v R*.⁵ The factors identified by the Court of Appeal in *Phillips* were intended to be illustrative only.⁶ Factors that may or may not apply in a given case are not a matter of general or public importance requiring further consideration by this Court.⁷

² *Liai v R* [2023] NZCA 326 (French and Collins JJ).

³ *Phillips v R* [2021] NZCA 651, [2022] 2 NZLR 661.

⁴ These factors are identified by the Court of Appeal at [28] of its judgment.

⁵ *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429; and *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551.

⁶ See *Gemmell v R* [2023] NZCA 420 at [60]. We are not to be taken as making any comment on the factors set out in *Phillips*.

⁷ Senior Courts Act 2016, s 74(2)(a).

[6] Nor do we consider there would be a risk of a substantial miscarriage of justice.⁸ Mr Liai submits the Court of Appeal did not consider the potential unavailability of rehabilitative programmes and reintegrative activities. There was no evidence on that matter before that Court or this Court. Even if it could be established that Mr Liai's status as a second-strike prisoner would restrict or defer access to rehabilitative programmes, we do not consider in the circumstances of this case that this could render his sentence so grossly disproportionate that it might breach s 9.

[7] The second proposed ground of appeal adds nothing of substance to the first ground and need not be considered further.

[8] As leave to appeal would be granted on neither ground, there is no point granting the application for an extension of time to apply for leave.

Result

[9] The application for an extension of time to apply for leave to appeal is dismissed.

Solicitors:

Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent

⁸ Senior Courts Act, s 74(2)(b).