NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 135/2023
[2024] NZSC 20

BETWEEN	BASIL STEVEN MIST Applicant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Court: Glazebrook, Kós and Miller JJ

Counsel: A J Bailey for Applicant
S C Baker and S R Lamb for Respondent

Judgment: 5 March 2024

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] An Extended Supervision Order (ESO) was imposed on Mr Mist on 26 August 2022 by Cooke J.[1] This was for the maximum 10-year term and with an intensive monitoring condition for the maximum 12 months.[2] Mr Mist consented to the imposition of the ESO in those terms.[3]

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1 *The Department of Corrections v Mist* [2022] NZHC 2178 (Cooke J) [HC judgment] at [3] and [16].
2 Parole Act 2002, ss 107I(4) and s 107IAC(3).
3 HC judgment , above n 1, at [10].

[2] Mr Mist applied to the Court of Appeal for leave to appeal out of time against the imposition of the ESO. On 6 November 2023, the Court of Appeal granted his application for leave to appeal out of time but dismissed his appeal.[4]

[3] Mr Mist now applies for leave to appeal to this Court.

Background

[4] The ESO was imposed on Mr Mist in anticipation of his release from a 20-year sentence for sexual offending against five girls aged between seven and 15, and the manslaughter of his teenage partner.

[5] Mr Mist had been sentenced to preventive detention following a successful appeal to the Court of Appeal by the Solicitor-General.[5] But that sentence was set aside on appeal to this Court[6] and subsequently replaced in a further Court of Appeal decision by the 20-year prison sentence[7] because preventive detention was unavailable due to his age.

[6] Mr Mist did not complete any rehabilitative programs while he was incarcerated.[8]

Decisions below

High Court decision

[7] Cooke J accepted that it was for the Court to find that the imposition of the orders is demonstrably justified in a free and democratic society and that the level of risk and the need to protect the public would need to be addressed in that light.[9] He considered, however, that there was a further perspective where the person consented

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4 *Mist v Chief Executive of the Department of Corrections* [2023] NZCA 549 (Mallon, Moore and Palmer JJ) [CA judgment] at [81] and [83].
5 *R v Mist* [2005] 2 NZLR 791 (CA).
6 *R v Mist* [2005] NZSC 77, [2006] 3 NZLR 145.
7 *R v Mist* [2007] NZCA 352.
8 HC judgment, above n 1, at [5].
9 At [10].

to the imposition of the orders (and he found that Mr Mist's consent was fully informed). The further perspective arose in his view from:[10]

> … the appreciation by the person who is the subject of the application that the measures sought to be imposed are thought to be to their ultimate benefit. Mr Mist does not wish to re-offend. He needs assistance to help him in that objective.

[8] The Judge then went on to consider the report provided by the health assessor and Mr Mist's circumstances, including that that he had no personal or community support. He concluded that the statutory criteria were met[11] and that it was appropriate that an ESO be put in place for 10 years with an intensive monitoring period of 12 months.[12]

Court of Appeal

[9] Mr Mist's appeal to the Court of Appeal was on the basis that the Judge gave insufficient reasons for making the order and that in any event there was not sufficient evidence to support the finding.[13]

[10] The Court of Appeal was satisfied that each of the four mandatory requirements in s 107IAA(1) were met. It said:[14]

> When taken together, these lead us to the *clear* conclusion that Mr Mist presents a high risk of committing a relevant sexual offence in future. This, coupled with our finding that Mr Mist has a pervasive pattern of serious sexual offending, means that the statutory criteria for making an ESO have been established.

[11] The Court of Appeal went on to say that the Court had previously said that, where an offender meets this high threshold, it will often be appropriate to confirm the ESO given the overarching statutory purpose of public protection.[15] The Court of Appeal said that it was satisfied that such an order was appropriate in all the circumstances of this case and therefore the Judge did not err in making the ESO.

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10 At [10].
11 At [15]; and see Parole Act 2002, s 107IAA(1).
12 At [16].
13 CA judgment, above n 4, at [1].
14 At [77] citing Parole Act, s 107I(2)(a) and (b) (emphasis added).
15 At [78] citing *McIntosh v Chief Executive of the Department of Corrections* [2021] NZCA 218 at [49].

Grounds of leave application

[12] Mr Mist applies for leave to appeal on the basis that the Court of Appeal adopted the incorrect approach to determining whether an ESO was justified. In addition to the statutory criteria, it is submitted that the Court of Appeal should have considered whether there was a "strong justification" for the imposition of the ESO.[16] The Court should not have applied the approach in *McIntosh v Chief Executive of the Department of Corrections.*

[13] The Chief Executive of the Department of Corrections opposes the application on the basis that, to the extent that the issue of whether or not there should be "strong justification" is a matter or general or public importance,[17] there are two cases currently before this Court that will consider the criteria for imposing an ESO and in any event it is clear on the facts that there is a strong justification for making an ESO against Mr Mist.[18]

Our assessment

[14] We do not consider that this application meets the criteria for granting leave to appeal. There are concurrent findings in the Courts below that the statutory criteria are met and the "*clear* conclusion" reached by the Court of Appeal was that Mr Mist still presents a high level of risk of committing a relevant sexual offence in the future.[19] We note in particular the gravity of Mr Mist's offending, his lack of community support and the fact he has not undertaken rehabilitation programmes in prison. In such circumstances, whatever the additional considerations that should have been taken into account, there is no risk of a miscarriage of justice.[20]

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16 See *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [190]; and *R (CA586/2021) v Chief Executive of the Department of Corrections* [2022] NZCA 225 at [53].

17 Senior Courts Act 2016, s 74(2)(a).

18 *Attorney-General v Chisnall* [2022] NZSC 77; and *R (SC 64/2022) v Chief Executive of the Department of Corrections* [2023] NZSC 31.

19 Emphasis added.

20 Senior Courts Act, s 74(2)(b). Nor, in these circumstances, does the application engage a matter or general or public importance: s 74(2)(a). As the Crown submits there are in any event already two cases before this Court which will consider the criteria for imposing an ESO.

Result

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

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