



COURT OF APPEAL OF NEW ZEALAND

TE KŌTI PĪRA O AOTEAROA

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Attorney-General of New Zealand v Daniel Clinton Fitzgerald [2024] NZCA 419

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

Summary

Today, the Court allowed an appeal by the Attorney-General against a decision of the High Court awarding \$450,000 in damages to Mr Fitzgerald for the breach of his rights to be free from arbitrary detention and disproportionately severe punishment. The Court made no order as to costs.

Background

On 3 December 2016, Mr Fitzgerald indecently assaulted a woman and assaulted her friend while walking along Cuba Street in downtown Wellington. Mr Fitzgerald was charged and convicted of indecent assault and assault pursuant to ss 135 and 196 of the Crimes Act 1961, respectively. The conviction for indecent assault was Mr Fitzgerald’s third qualifying offence under the “three strikes regime” and the sentencing Judge imposed the maximum penalty, being seven years’ imprisonment, as thought to be required by s 86D(2) of the Sentencing Act 2002.

Mr Fitzgerald appealed his sentence unsuccessfully to this Court, but successfully to the Supreme Court. The Supreme Court held that the seven-year term breached Mr Fitzgerald’s

right under s 9 of the New Zealand Bill of Rights Act 1990 not to subject to disproportionately severe punishment. A rights-consistent interpretation of the three strikes regime meant it should be read as subject to the proviso that the maximum sentence should not be imposed if doing so would breach s 9. Mr Fitzgerald's sentence had therefore been imposed in error of law. Mr Fitzgerald was subsequently resentenced to a term of six months' imprisonment, which by that stage he had already served.

High Court

Mr Fitzgerald then brought a claim in damages against the Crown based on the breach of his s 9 right. In the High Court, Ellis J held that, at the point where Mr Fitzgerald's detention became grossly disproportionate to his offending, his continued detention became arbitrary, and in breach of the right not to be arbitrarily detained in s 22 of the Bill of Rights Act. She assessed this arbitrary detention as being for approximately 44 months. The Judge held the breach was the consequence of the action of the Crown prosecutor laying the charge of indecent assault. The prosecutor had a duty to prefer a different charge where proceeding with the charge of indecent assault would result in the foreseeable and likely grossly disproportionate sentence because of the operation of the three strikes regime as then understood. She awarded Mr Fitzgerald \$450,000 in damages together with interest.

This appeal

The Attorney-General appealed. The question on appeal was whether the Judge erred in finding the Crown prosecutor was liable for the breach of Mr Fitzgerald's s 9 right not to be subject to grossly disproportionate treatment, and that Mr Fitzgerald should be compensated by way of a damages award.

This Court unanimously concluded:

- (a) The sentence ultimately imposed, and the corresponding breach of Mr Fitzgerald's rights, was the act of the sentencing Judge, not the prosecutor. The prosecutor cannot be liable for the breach of Mr Fitzgerald's rights as a result of the sentence imposed by the sentencing Judge.
- (b) It is a corollary of the role of the sentencing Judge that the decision whether or not to prosecute is for the prosecutor with a very limited potential for judicial

review. The issue in Mr Fitzgerald's case concerns the decision to prosecute for the particular offence charged. It is alleged the prosecutor failed to take into account matters that should have been taken into account in deciding to proceed with a charge of indecent assault. This is not because Mr Fitzgerald's conduct was not within the ambit of the indecent assault charge, but because the sentence that would necessarily follow (on the view of the law then held) would be grossly disproportionate. That consequence would be the result not of the decision to prosecute, but of the legislative scheme that Parliament had put in place.

- (c) When selecting a charge, a prosecutor should be mindful of the Solicitor-General's Prosecution Guidelines and Bill of Rights Act considerations. In the present case, at the time of charging the common understanding was that s 86D(2) of the Sentencing Act meant the maximum sentence would apply. Given that assumption, the only factor pointing away from commencing a prosecution would be the desire to avoid the impact of s 86D(2) on Mr Fitzgerald's sentence. However, it cannot be that these considerations require a prosecutor not to proceed with an (otherwise appropriate) charge because of the mandatory minimum sentence legislated by Parliament.
- (d) Underpinning this conclusion is the Supreme Court's decision in Mr Fitzgerald's earlier sentence appeal. That fairly held that the responsibility for imposition of the appropriate sentence rests here, as in every case, with the sentencing Judge, and with the court that deals with any appeal. It is not a matter for which the prosecutor assumes responsibility. Once the charge had been laid, it was open to the sentencing Judge to not sentence Mr Fitzgerald to the maximum term, in accordance with the approach taken by the Supreme Court in Mr Fitzgerald's sentence appeal, and accordingly avoid the breach of Mr Fitzgerald's rights. It follows that the prosecutor cannot be liable for a breach of the Bill of Rights Act as a result of the sentencing process miscarrying.
- (e) For a variety of reasons, Mr Fitzgerald was sentenced to imprisonment for far too long. There can be no proper or lawful justification for Mr Fitzgerald's loss

of freedom for the extensive 44 months he spent in prison while subject to a grossly disproportionate sentence. Consideration should be given as to whether the existing compensation scheme for wrongful imprisonment should be extended to apply to persons whose sentence is shown to breach s 9 of the Bill of Rights Act where the appeals process has not removed the grossly disproportionate element of the sentence. It is consistent with New Zealand's international obligations, and with being a society that prides itself on adherence to the rule of law and the protection of human rights, for compensation to be provided in circumstances such as the present.

In his concurring reasons, Miller J added the following observations:

- (a) It was not possible to attribute Mr Fitzgerald's detention to the prosecutor's decision to pursue an indecent assault charge. Although Mr Fitzgerald would not have faced a third-strike sentence but for the prosecutor's decision, the outcome would have been the same had the prosecutor diligently drawn to the Judge's attention the interpretation later adopted by the Supreme Court, because the Judge would still have thought he did not have authority to impose less than the maximum sentence. That meant the prosecutor's decision was not a cause in law of Mr Fitzgerald's detention. The length of his detention was attributable to the judicial decisions first to impose the sentence and then to uphold it on appeal, necessitating a second appeal to the Supreme Court.
- (b) The length of time taken between Mr Fitzgerald's first and second sentencing hearings, which corresponds approximately to the period of detention Ellis J held to be arbitrary, was also too remote to be attributed to the prosecutor's decision to pursue the indecent assault charge. That period was taken up by appellate processes which are under the control of the judiciary. It was also affected by the COVID-19 pandemic.
- (c) The first question when considering compensation under the Bill of Rights Act is whether it is needed to provide an effective remedy, which includes non-monetary relief. Where damages are necessary, the sum awarded should be enough to ensure that the relevant state agencies have an incentive not to repeat

the conduct. In the present case, though, the appellate process eventually did provide an effective remedy by bringing Mr Fitzgerald's detention to an end and ensuring that other prisoners would not be sentenced to terms which contravened s 9. Compensation was not needed to ensure that would be the case, nor is there anything the Attorney-General could do consistent with institutional judicial independence to ensure judges' future compliance.