IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 53/2026
[2026] NZSC 155

BETWEEN	KENNETH MILLER Applicant
AND	THE KING Respondent

Court: Williams, Kós and Campbell JJ

Counsel: A J Ellis for Applicant
R K Thomson for Respondent

Judgment: 23 October 2026

JUDGMENT OF THE COURT

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

REASONS

[1] This is an application by Mr Miller for leave to bring a second appeal against a sentence of preventive detention.[1] His first appeal as of right was dismissed by the Court of Appeal in December 2010.[2]

[2] Mr Miller has a lengthy history of minor criminal activity, punctuated by aggressive violence and sexual assault. In 1976, as a 17-year-old, he seriously assaulted an elderly woman and was made a special patient due to "mental deficiency". After being released into the community and starting a family, in 1986 he was convicted of tying his 61-year-old neighbour to her bed and raping her. He was

1 *R v Miller* HC Christchurch CRI 2005-009-13007, 14 July 2006 (Gendall J) [Sentencing notes].
2 *Miller v R* [2010] NZCA 590 (Harrison, Ronald Young and Keane JJ) [CA judgment].

sentenced then to five years' imprisonment. In 1994, he was convicted of burglary and assault after entering an intellectually disabled neighbour's home under false pretences, grabbing her nightie and pushing her onto the bed, and was again imprisoned. After being released, and despite forming a new and stable family life, he sexually violated a stranger on the street. That resulted in the sentence of preventive detention now put in issue.

[3] Mr Miller pleaded guilty to sexual violation and assault and was sentenced by Gendall J to preventive detention in 2006.[3] Reports from two forensic health experts were before the Court as required by s 88 of the Sentencing Act 2002. They concluded that Mr Miller posed a significant risk of further violent offending, likely to be against vulnerable adult females, or a high risk of violent reoffending and a medium to high risk of sexual reoffending. The reports also noted that previous assessments had found he had a full-scale IQ of 79–81. As already noted, his appeal from that sentence was dismissed by the Court of Appeal in 2010.[4]

[4] Subsequent reports in 2012 and 2013 indicated a more severe degree of disability, amounting to intellectual disability. In 2018, and again in 2020, counsel for Mr Miller obtained reports from psychologists Louisa Medlicott and Dr Olive Webb for Parole Board hearing purposes. They suggested that Mr Miller in fact had a full-scale IQ of 53. The Board was not, however, persuaded to release Mr Miller from custody.

[5] In 2022, Mr Miller challenged the Board's decision in an application for judicial review. The new report was relied on, and not challenged by the Crown. The application for judicial review was dismissed by Simon France J.[5] His decision has not been appealed. We note that the judgment also records the following:[6]

> This history leads Dr Ellis to query Mr Miller's fitness to plead and stand trial in 2006. I accept there would seem to be a valid issue to address since there is little to suggest his disability has significantly changed. It is common ground that issue will need pursuing through different avenues. This judgment must proceed on the basis of a valid conviction and sentence.

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3 Sentencing notes, above n 1.
4 CA judgment, above n 2.
5 *Miller v Attorney-General* [2022] NZHC 1832.
6 At [13], n 1.

Extension of time and proposed appeal

[6] Mr Miller now seeks an extension of time for leave to appeal to this Court against the Court of Appeal decision from 2010, which confirmed the sentence of preventive detention imposed by the High Court in 2006.

[7] The basis for the application is new evidence of Mr Miller's profound intellectual disability, being of the order of a full-scale IQ of 53 rather than the 79–81 before the sentencing Judge. The application is brought, therefore, on the basis that the sentence in the appellate courts proceeded without proper appreciation of the degree of Mr Miller's intellectual disability. It is submitted that this impacted on the sentencing Judge's assessment of culpability, evaluation of risk and proportionality of imposing preventive detention.

[8] A further proposed ground relates to the fact that the sentencing Judge subsequently presided over Parole Board hearings concerning Mr Miller. It is said that this gives rise to concerns about apparent bias and institutional fairness.

Discussion

[9] We may put to one side the last point, which has no relevant bearing on the imposition of sentence or the dismissal of the appeal in 2010 by the Court of Appeal.

[10] Despite further probing by this Court, the delay in bringing the present appeal remains unsatisfactorily explained. It is apparent from the report of the psychologist (which was produced after request by this Court) that the real level of Mr Miller's intellectual disability has been known probably since 2012 or 2013, and by 2018 at the latest.

[11] That delay would not prevent this Court from granting an extension of time or granting leave to appeal if the interests of justice required it.[7] We are satisfied, however, that the interests of justice do not require extension of time for the proposed sentence appeal.

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7 See *Ellis v R* [2019] NZSC 83 at [15]; and *Oketopa v R* [2020] NZSC 75 at [18].

[12] First, it is apparent that Mr Miller's low cognitive functioning was apprehended by the health assessors and the sentencing Judge in 2006, and by the Court of Appeal in 2010. While the extent of his intellectual disability was not apprehended at that time, that does not necessarily mean preventive detention was inappropriately imposed. As the Crown submits, the purpose of the preventive detention sentence imposed on Mr Miller was to protect the community from those who pose a significant and ongoing risk to the safety of its members. It is not suggested that preventive detention is no longer justified because the new intellectual disability assessment means Mr Miller's risk of further violent or sexual offending is reduced materially. If the true issue relates to the nature rather than the fact of his detention, an alternative sentencing course might have been detention as a special care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. Significantly, the same outcome is available to Mr Miller now (and has been since his diagnosis of intellectual disability dating back to at least 2018). Part 4 of that Act enables a prison manager to refer a prisoner for such assessment by a care co-ordinator. No such reference appears to have been made or suggested. We would encourage that course. Absent that being done, we are not persuaded that the appearance of substantial miscarriage in sentencing has been demonstrated, nor that it is necessary in the interests of justice at this point for an extension of time to be given to enable the proposed appeal.

[13] Secondly, picking up on Simon France J's observation noted at [5] above, the matter now raised appears more relevant to conviction, not sentence. We inquired of counsel for Mr Miller whether he had obtained instructions in relation to a conviction appeal. Counsel indicated that there were real difficulties in obtaining relevant instructions given the extent of Mr Miller's disability, and the passage of time since 2006. We share Simon France J's view that this is a matter that may deserve exploration. But in that case, it will need to be explored by the Court of Appeal on a first appeal against conviction, rather than by this Court now.

Result

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

Solicitors:
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