IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA8/2019
[2024] NZCA 632

BETWEEN	CODY PAUL GRIFFIN Applicant
AND	THE KING Respondent

Court: Mallon, Dunningham and Powell JJ

Counsel: D J Allan for Applicant
B F Fenton for Respondent

Judgment: (On the papers) 3 December 2024 at 1 pm

JUDGMENT OF THE COURT

A The applications to adduce further evidence are granted.

B The application for recall is declined.

REASONS OF THE COURT

(Given by Dunningham J)

Introduction

[1] The applicant, Mr Griffin, is serving a sentence of 10 years nine months' imprisonment for manslaughter and aggravated robbery. Because his offending comprised "stage-2" offences under the "three strikes" provisions of the Sentencing Act 2002 which were in force at the time, he is required to serve that sentence without parole.

[2] Mr Griffin appealed his sentence to this Court in 2019, but that appeal was dismissed (the 2019 judgment).[1]

[3] Mr Griffin now applies to recall the 2019 judgment in order to advance a new argument relying on the subsequent decisions in *Fitzgerald v R*,[2] and *Matara v R*,[3] saying the non-parole order imposed on the second strike should be quashed because it constitutes a breach of s 9 of the New Zealand Bill of Rights Act 1990 (NZBORA).

[4] The Crown opposes the application for recall.

The offending

[5] Mr Griffin was sentenced for his first strike offence in 2011, when he was 19.[4] The charges on which he was sentenced were wounding with intent to cause grievous bodily harm and unlawful possession of a firearm and ammunition.

[6] The facts giving rise to those charges were as follows. Mr Griffin had been driving around with co-offenders who were making "gang-related gesturing and noises" to a man walking along the road.[5] He then pointed a rifle at the victim and fired at him. The projectile struck the victim in the scrotum, irreparably damaging a testicle, and lodged in his right thigh.

[7] The Judge described the offending as "in the realms of a drive-by shooting" with a "gang overtone".[6] From a starting point of seven years' imprisonment, with credits for guilty plea, youth and remorse, Mr Griffin was sentenced to five years and three months' imprisonment. At the conclusion of sentencing the Judge also provided the following warning: "You need to understand something. Any more firearms for you, you are going to get a big, long sentence. Do you understand?"[7]

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1 *Griffin v R* [2019] NZCA 422 [2019 CA judgment].
2 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551.
3 *Matara v R* [2021] NZCA 692, (2021) 30 CRNZ 808.
4 *R v Griffin* DC Rotorua CRI-2011-069-135, 27 May 2011 [first strike offending].
5 At [5].
6 At [11].
7 At [26].

[8] The second-strike offending involved an aggravated robbery carried out with two co-offenders in July 2017. Mr Griffin brought three firearms and ammunition to the rural property. He was also the driver. He and his co-defendants knew a firearm was to be used in the robbery and he knew the firearm was loaded. Mr Griffin's role was to grab the victim's partner and pull her to the ground so she could not alert the victim to the presence of the defendants. One of the co-defendants then fired the fatal shot.

[9] Although charged with murder, Mr Griffin was found guilty of manslaughter and aggravated robbery. He was sentenced to 10 years and nine months' imprisonment for manslaughter with a concurrent sentence of eight years and six months' imprisonment for the aggravated robbery.[8]

[10] In sentencing Mr Griffin, Katz J noted that the offending exhibited six of the aggravating features in *R v Taueki*, being premeditation, serious injury, use of weapons, facilitation of a crime, multiple attackers and home invasion.[9] But for the fact of the non-parole order, the Judge said she would have imposed a minimum period of imprisonment of 50 per cent of the term.[10]

Submissions for the applicant

[11] Mr Griffin advances his application for recall on the combined effect of the following two factors:

(a) he must serve a sentence that is twice as long as would otherwise be the case before he is eligible for parole; and

(b) the way the Ara Poutama Aotearoa | Department of Corrections (Corrections) administers the sentence means he is not permitted to commence the reintegration phase of his sentence until one year prior to his sentence end date.

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8 *R v Chase* [2018] NZHC 3332 [second strike offending] at [104].
9 At [71], citing *R v Taueki* [2005] 3 NZLR 372 (CA).
10 At [86].

[12] Mr Griffin seeks leave to file affidavit evidence in support of his application.

[13] In his affidavit he explains that he has completed a number of rehabilitative programmes in prison. However, he is not permitted to move to self-care accommodation, nor is he able to commence release to work programmes until one year before his sentence end date.[11] He says it would be invaluable to help him with the adjustment back towards being a productive member of society if he could commence reintegration programmes now, rather than wait at least a further three years to do so.

[14] Counsel for Mr Griffin, Mr Allan, submits that it is the combination of the non-parole order (which extends his non-parole time by a multiplier of two), combined with the prohibition on moving to external self-care accommodation or starting release to work, that breaches s 9 of NZBORA. Mr Allan says that what is "grossly disproportionate", such that it would shock the national conscience and breach s 9 of NZBORA, is the way the second strike non-parole order, in combination with the Corrections Regulations 2005 and the Corrections' Prison Operations Manual, prohibits Mr Griffin from progressing on to the reintegration phase of his sentence.

Submissions for the respondent

[15] The Crown opposes both the application for recall and the application to file further affidavit evidence in support.

[16] It says, first, that the non-parole period itself does not breach s 9 given the nature and circumstances of Mr Griffin's stage-1 and stage-2 offences. The imposition of a non-parole order did not result in a sentence so grossly disproportionate as to shock the national conscience. Likewise, the fact that the non-parole order means Mr Griffin's access to self-care accommodation is deferred until near the end of his sentence and he is ineligible for release to work, does not render his sentence so grossly disproportionate as to breach s 9 of NZBORA.

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[11] On receipt of the respondent's evidence the appellant's legal submissions modified this statement to clarify he can only move to internal self-care accommodation when close to his sentence end date and he can not commence release to work programmes or move to external self-care accommodation at all.

[17] Finally, the Crown records that if Mr Griffin's evidence is admitted, then it seeks leave to file an affidavit from the Director of Integrated Systems for the Department of Corrections, Robert Owen Jones, regarding how Corrections makes decisions on access to reintegration programmes such as release to work and accommodation in a self-care unit.

[18] In summary, Mr Jones' affidavit evidence states that under reg 26 of the Corrections Regulations, only prisoners who have reached their parole eligibility date can be permitted to be temporarily released for work. Mr Griffin does not come within any exception to that rule in the Regulations. He also explains, that in terms of self-care units, there are both internal and external self-care units. In terms of external self-care units, because Mr Griffin is not eligible for temporary release, he is not eligible for placement in external self-care accommodation either. Only some prison facilities operate internal self-care units. Rolleston Prison, where Mr Griffin currently is, does not have any self-care units. He would have to transfer to another prison to have the possibility of being placed in a self-care unit.

[19] Under the Prison Operations Manual, placement in an internal self-care unit is determined on a case-by-case basis by the prisoner's case manager and case officer. However, in deciding whether a prisoner is suitable for placement in such a unit, they must consider whether the applicant "is at a stage of their imprisonment that they are preparing for release". By implication, it seems that Mr Griffin would not currently be eligible for such a placement.

Leave to adduce affidavit evidence

[20] In order to consider the application for recall fully and fairly, we have decided to grant leave to file both the applicant's and the respondent's further evidence.[12] While the evidence is not strictly fresh, in the sense that the limitations on access to temporary release under reg 26 were always a consequence of Mr Griffin's sentence, the application is premised on the combination of these circumstances reaching the threshold identified in *Fitzgerald* and *Matara*, and the cogency of the evidence is not in dispute. What is in dispute is whether, in all the circumstances of Mr Griffin's

[12] There is jurisdiction to do so: *Jolley v R* [2022] NZSC 150, [2022] 1 NZLR 595 at [24].

incarceration, including those now relied on, there is a breach of s 9 of NZBORA warranting recall of the 2019 judgment. To assess that we need to consider the further affidavit evidence.

Legal principles applying to applications for recall

[21] This Court has jurisdiction to recall a judgment if one of the following three circumstances exists:[13]

(a) since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority;

(b) at the hearing the parties failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; or

(c) for some very special reason, justice requires the judgment be recalled.

[22] In *Liai v R*, this Court accepted that, in the context of a three-strikes regime, if Mr Liai were able to demonstrate that the sentence he was currently serving was inconsistent with his rights under s 9 of NZBORA, then that would qualify as an operative reason for recall and resentencing.[14] The Court went on to say "it would obviously be unjust to hold that simply because Mr Liai happened to have exercised his appeal rights before *Fitzgerald*, he should be in a different legal position for that reason alone".[15] The Court identified the crucial question as being "whether Mr Liai's sentence [was] capable of meeting the test for a breach of s 9 and therefore whether the [initial appeal] judgment warrant[ed] a recall".[16]

[23] We consider the same question arises in this case, albeit with reference to the 2019 judgment.

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13 *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633; *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76 at [2]; and *Uhrle v R* [2020] NZSC 62, [2020] 1 NZLR 286 at [22], [25] and [29].

14 *Liai v R* [2023] NZCA 326 at [35].

15 At [35].

16 At [36].

Is this an appropriate case for recall?

[24] We begin by observing (as Mr Griffin accepts) that the non-parole order imposed as a consequence of this being stage-2 offending in and of itself does not breach s 9. Both the 2011 offending and the 2017 offending involved serious violent offending, with a victim permanently injured in the first case, and killed in the second. Both incidents involved the use of firearms with Mr Griffin using the firearm in the first case and providing the firearms and ammunition in the second case. Unlike in *Fitzgerald*, this was the kind of serious violence offending that Parliament intended would be captured by the three strikes regime.[17]

[25] Furthermore, unlike the defendant in *Fitzgerald*, Mr Griffin does not suffer from a mental illness or mental impairment which would contribute to a sentence imposed under the three strikes regime being "disproportionately severe". We are satisfied that the fact Mr Griffin will not be released until he has served his full sentence of 10 years and nine months' imprisonment, instead of being eligible for release after five years and four and a half months is not an outcome that breaches s 9 of NZBORA or would shock the conscience of properly informed New Zealanders aware of all relevant circumstances of the offence and offender.

[26] The only issue for us to consider is whether the fact certain reintegration programmes will either not be available to Mr Griffin at all, or may only be available near the very end of his sentence, is enough to make the sentence so grossly disproportionate as to breach s 9. We do not consider it does.

[27] There is a high threshold for determining that a sentence is disproportionately severe in terms of s 9 of NZBORA.[18] As was observed in *Matara*, the threshold has been "variously … described as treatment so excessive as to outrage contemporary standards of decency, conduct so severe as to shock the national conscience, treatment grossly disproportionate to the circumstances or such as to shock the national

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17 The Bill's explanatory note recorded that it was "specifically targeted at offenders who show contempt for the court system and the safety of others by continuing to offend despite long prison sentences and judicial warnings": see Sentencing and Parole Reform Bill 2009 (17-1) (explanatory note) at 1.

18 *Fitzgerald v R*, above n 2, at [79] per Winkelmann CJ, [161], [163], [167] and [230] per O'Regan and Arnold JJ, and [240] per Glazebrook J.

conscience".[19] In that case, it was considered the denial of parole for an additional six years over what would have been permitted under ordinary sentencing principles, especially having regard to Mr Matara's mental illness and psychosis, meant the result was inconsistent with s 9 of NZBORA.

[28] In *Phillips v R*, three factors were identified as relevant to determining whether what was, in that case, a stage-3 sentence, breached s 9.[20] The factors identified included:[21]

(a) any difference in the nature of the sentence that would otherwise have been imposed;

(b) the difference between any prison sentence that would have been imposed but for the three strikes regime; and

(c) the nature of the offending and whether the defendant is "plainly an inadvertent and unforeseen casualty of the three strikes regime".

[29] In respect of the nature of the sentence, there is no dispute that Mr Griffin would have received a sentence of imprisonment regardless of whether the three strikes regime applied.

[30] In terms of sentence length, unlike in *Phillips*, this was a stage-2 strike offence, and this Court has already determined, on appeal, that the sentence imposed was not manifestly excessive.

[31] In terms of the consequences of the non-parole order, the temporary release of prisoners, for employment or other reasons, is governed by s 62 of the Corrections Act 2004 and reg 26 of the Corrections Regulations. Regulation 26 prohibits temporary release being offered to prisoners in Mr Griffin's circumstances who are not eligible for parole. That can not be seen as an unintended consequence of the three-strikes

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19 *Matara v R*, above n 3, at [72].
20 *Phillips v R* [2021] NZCA 651, [2022] 2 NZLR 661 at [28].
21 At [28].

regime when temporary release is directly linked to parole eligibility. Rather, it is an expected consequence of the sentence imposed, including the non-parole order.

[32] In any event, reg 26 does not preclude other forms of reintegration support. As the respondent points out, Mr Griffin is not ineligible for internal self-care accommodation, although that is not available where he is currently imprisoned. Mr Griffin can request a transfer to another prison where such accommodation is provided and he can apply for such a placement, although the length of time until he is eligible for release makes it unlikely he will get such a placement until much closer to his release date.

[33] However, we observe that release to work and moving to self-care accommodation are not the only steps that can be taken to assist in Mr Griffin's reintegration. The Corrections February 2024 report in relation to Mr Griffin makes the following recommendation:

> To prepare for release, it is recommended Mr Griffin make use of the time remaining on his sentence to engage in available reintegration opportunities. These activities should be identified with support from his Case Manager and include development of vocational skills (e.g., completing qualifications and engaging in prison-based employment), building relationships with appropriate professional and personal support people in the community, and securing appropriate accommodation that will ideally result in his release to an area with less known high risks.

[34] It is clear from this that other reintegration opportunities including vocational training, remain available to Mr Griffin while in prison.

[35] In any event, even if Mr Griffin were eligible for parole, he would not automatically be entitled to placement in external self-care accommodation or temporary release to work. His non-parole order simply closes off the possibility of these options.

[36] For all these reasons, we are satisfied that, having regard to the totality of effects of Mr Griffin's sentence, this is not a sentence which reaches the high threshold of being in breach of s 9 of NZBORA.

Result

[37] The applications to adduce further evidence are granted.

[38] The application for recall is declined.

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