IN THE SUPREME COURT OF NEW ZEALAND

SC 53/2014
[2014] NZSC 65

BETWEEN	RONALD VAN WAKEREN Applicant
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Court:	McGrath, William Young and Glazebrook JJ
Counsel:	Applicant in person A R Longdill and W N Fotherby for the Respondent
Judgment:	6 June 2014

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] This application for leave to appeal relates to a Court of Appeal judgment[1] upholding a High Court decision dismissing Mr van Wakeren's application for a writ of habeas corpus.[2] The application is based on the contention that the warrant under which the applicant is currently detained in prison is invalid.

[2] On 3 October 2011 the Court of Appeal delivered judgment on an appeal by the applicant against convictions and sentences imposed in relation to various matters including a burglary.[3] In relation to the burglary conviction, the Court reduced the term of the sentence of imprisonment imposed by the District Court

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1 *van Wakeren v Chief Executive of the Department of Corrections* [2013] NZCA 71.
2 *van Wakeren v Chief Executive of the Department of Corrections* [2013] NZHC 144.
3 *van Wakeren v R* [2011] NZCA 503.

from six years to five years. Sentences imposed in respect of other offending, together with their respective concurrent or cumulative status, were confirmed. The overall effect of the judgment on the appeal was that the total sentence of 13 years three months imprisonment imposed by the District Court was set aside and a sentence of 12 years and three months imprisonment substituted.

[3] Various applications to the Supreme Court seeking leave to appeal against this judgment were dismissed.[4]

[4] The applicant brought a separate proceeding in the High Court applying for a writ of habeas corpus. One ground was his claim that there were errors in the warrant for imprisonment that had been issued by a Judge following the 2011 judgment of the Court of Appeal. This habeas corpus application was dismissed by the High Court[5] but, on appeal, the Court of Appeal accepted that there had been errors in the original District Court warrant, which had been carried through to the warrant that was issued in the Court of Appeal following the successful sentence appeal in October 2011.[6] In its judgment delivered on 17 February 2012, the Court concluded that the errors concerned did not invalidate the warrant of imprisonment issued in 2011. It accordingly dismissed the appeal against the High Court judgment. A Judge, however, issued an amended warrant of imprisonment in order to correct the errors identified by the Court of Appeal in the earlier warrant.

[5] This amended warrant was the subject of a fresh habeas corpus application by Mr van Wakeren which was dismissed by Courtney J in a judgment delivered on 8 February 2013.[7] His appeal against that judgment to the Court of Appeal was dismissed on 20 March 2013.[8] The applicant applied for leave to appeal against that judgment on 14 May 2014. No reason is given for the delay in doing so.

[6] The applicant seeks leave to appeal in order to argue that the amended warrant of imprisonment issued after the Court of Appeal judgment of 17 February

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4 *van Wakeren v R* [2011] NZSC 147; and *van Wakeren v R* [2012] NZSC 23.
5 *van Wakeren v Chief Executive of Department of Corrections* HC Auckland CIV2012-404-0208, 26 January 2012.
6 *van Wakeren v Chief Executive of Department of Corrections* [2012] NZCA 22.
7 *van Wakeren v Chief Executive of Department of Corrections*, above n 2.
8 *van Wakeren v Chief Executive of Department of Corrections*, above n 1.

2012 was defective and invalid. His proposed argument is based on s 385(3) of the Crimes Act 1961 and s 91 of the Sentencing Act 2002. The former provision empowers the Court of Appeal in a sentence appeal to quash a sentence imposed by the Court below and substitute another sentence that it thinks ought to have been imposed. The latter provision requires that if a court imposes a sentence of imprisonment a warrant is issued stating briefly the particulars of the offence and directing detention in accordance with the sentence.

[7] The applicant contends that in this case these provisions only authorised the issue by the Court of Appeal Judge of a warrant that detained the applicant in respect of the sentence to imprisonment for five years on the burglary charge. The warrant could not, he says, impose sentences that had already been imposed by the District Court and had not been altered by the Court of Appeal.

[8] We, however, are satisfied that the correct legal position is reflected in the judgments of the Court of Appeal and Courtney J dismissing the habeas corpus application.[9] Although the main reason for allowing the sentence appeal was the Court's conclusion that the sentence warranted on one charge was a term of five years rather than six years imprisonment, the position in terms of s 385(3) was that the sentence was a total integrated sentence of 13 years three months imprisonment and therefore, necessarily, the appeal was also against that total integrated sentence. The powers of substitution under s 385(3) therefore applied to that sentence. Accordingly it was the Court of Appeal itself that imposed the amended total sentence. The amended warrant subsequently issued directing detention in accordance with that sentence was therefore properly issued.

[9] For completeness we add that this application of s 385 is well established and indeed was applied by Toogood J in the judgment of the High Court in the applicant's challenge to the earlier warrant.[10] The present proceeding accordingly was one requiring re-examination by the Court of a question substantially the same as that considered when the earlier application was refused. In that respect it was barred by s 15 of the Habeas Corpus Act 2001.

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9 *van Wakeren v Chief Executive of Department of Corrections*, above n 2; and *van Wakeren v Chief Executive of Department of Corrections*, above n 1.

10 *van Wakeren v Chief Executive of Department of Corrections*, above n 5, at [13].

[10] In these circumstances, we are satisfied that a further appeal to this Court is not necessary in the interests of justice in terms of s 13 of the Supreme Court Act 2003. The application for leave to appeal is accordingly dismissed. The application for an interim order for release from detention consequentially lapses.

Solicitors:
Meredith Connell, Auckland for Respondent