

IN THE SUPREME COURT OF NEW ZEALAND

**SC 98/2015
[2015] NZSC 159**

BETWEEN ANTONY FREDRICK GRAY
 Applicant

AND THE QUEEN
 Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: P E Dacre QC for Applicant
 K S Grau for the Respondent

Judgment: 28 October 2015

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Background

[1] Mr Gray was sentenced to nine years and four months imprisonment for drug dealing (possession of methamphetamine and cannabis for supply) and related firearms offending. He applies for leave to appeal on the basis that a discount should have been allowed for an injury he suffered in prison as a result of an assault by a fellow inmate.

[2] The assault occurred on 26 June 2014 at the Mt Eden Correctional Facility. In the attack, Mr Gray sustained a serious injury to his right elbow. His submissions state that the use of his arm is still “significantly compromised” and the “circumstances of the assault means that he continues to have security issues”. In the submissions filed in this Court, Mr Gray’s counsel accepts that there is not a

sufficient factual basis to allege a breach of either ss 9 or 23(5) of the New Zealand Bill of Rights Act 1990.¹

[3] The sentencing judge, Judge Andrée-Wiltens, refused to discount Mr Gray's sentence because of the injury.² That was upheld by the Court of Appeal.³ The Court of Appeal was "not persuaded that the Judge erred in considering the injury to be a 'personal circumstance' against which the deterrence of methamphetamine offending is more important".⁴

Discussion

[4] Whether a discount should be given because of a failure of prison authorities to protect an inmate may be one of public importance. Apart from a newspaper report, however, we have nothing before us on the circumstances of the assault leading to the injury and whether it was in fact preventable by the prison authorities. There is also no suggestion that the injury makes it unduly hard for Mr Gray to cope in prison. Security concerns are mentioned but it is not alleged that there is special or undue hardship as a result of these concerns.

[5] Whether drug offences come into a special category where personal circumstances are largely irrelevant may also be an issue of public importance but (ignoring the "public interest" aspect discussed above) Mr Gray's injury would not be a personal circumstance that would justify a discount. So the question is academic in this case.

[6] Finally, we accept the Crown's submission that, even if a discount had been appropriate because of Mr Gray's injury, the same end sentence could well have been reached, given the Court of Appeal's finding that the Judge had been "generous" in uplifting the sentence by only two years to reflect Mr Gray's other serious offending.⁵

¹ This is stated to be subject to what may come out of the inquiry into the management of the facility. Mr Gray has been spoken to as part of that inquiry, although Mr Gray's injury was not specifically the subject of the inquiry.

² *R v Gray* DC Auckland CRI 2013-044-1786, 21 November 2014 (sentencing notes) at [14].

³ *Gray v R* [2015] NZCA 297 (Harrison, Andrews and Gilbert JJ).

⁴ At [14].

⁵ At [12].

Disposition

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

Solicitors:
Crown Law Office, Wellington for Respondent