IN THE SUPREME COURT OF NEW ZEALAND

SC 64/2017
[2017] NZSC 164

BETWEEN	ELI DEVOY Applicant
AND	THE QUEEN Respondent

Court: Elias CJ, O'Regan and Ellen France JJ

Counsel: B J Hunt for Applicant
P D Marshall for Respondent

Judgment: 6 November 2017

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant was found guilty after trial before Judge Gibson of 20 offences arising out of a mortgage fraud scheme.[1] Over $5.8 million was advanced by the lenders due to the fraudulent scheme[2] and the benefit to the applicant, described as the "ringleader" of the scheme,[3] was in the order of $759,000.[4]

[2] The applicant was sentenced in relation to these charges and to four charges of obtaining a pecuniary benefit by deception to which she pleaded guilty. A term of imprisonment of five years[5] with a minimum period of imprisonment (MPI) of two

1 *Serious Fraud Office v Devoy* [2016] NZDC 10933.
2 *R v Stone (aka Devoy)* [2016] NZDC 15958 (Judge Gibson) [Sentencing remarks] at [4].
3 At [1].
4 At [7].
5 At [25].

and a half years was imposed.[6] The applicant appealed unsuccessfully against her conviction and sentence to the Court of Appeal.[7] She now seeks leave to appeal to this Court against sentence. The applicant wishes to argue that the Judge was wrong to impose an MPI. There is no challenge to the five year term of imprisonment.

The proposed appeal

[3] The applicant says that the proposed appeal raises questions about the interpretation of s 86(2) of the Sentencing Act 2002 under which an MPI may be imposed if the period before which the offender would otherwise be eligible for parole is "insufficient" for any of the stated reasons. Those questions are said to arise where, on the applicant's case, there were no or inadequate reasons for the decision to impose an MPI and insufficient evidential basis for doing so. The applicant also wishes to argue that the imposition of an MPI was manifestly unjust given the applicant's personal circumstances. Those circumstances include the needs of her family.

[4] The application is advanced as a direct appeal from the sentencing decision of the District Court.[8] This is on the basis that the Court of Appeal did not discuss the sentence appeal. That was because it was accepted by the applicant's counsel (not counsel on the application for leave) that the sentence appeal could only succeed if the conviction appeal on one or more of the charges was successful.[9] As the conviction appeal failed, no question of reduction in the sentence arose.

[5] Irrespective of whether the application is treated as an application for a direct appeal or as an application for an appeal from the Court of Appeal's dismissal of the sentence appeal, the criteria for leave are not met.[10] To the extent that the applicant seeks to have this Court provide guidance as to the approach to s 86(2), it is not appropriate for the Court to do so in the absence of any consideration of that section and its application by the Court of Appeal in this case. Nor, on the material before

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6 At [27].
7 *Devoy v R* [2017] NZCA 213 (Harrison, Gilbert and Katz JJ) [*Devoy* (CA)].
8 Sentencing remarks, above n 2.
9 *Devoy* (CA), above n 7, at [7].
10 Supreme Court Act 2003, ss 13 and 14; and Senior Courts Act 2016, ss 74 and 75.

us, is there a risk of a miscarriage of justice if the proposed appeal is not heard in this Court.

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

Solicitors:
Crown Law Office, Wellington for Respondent