

IN THE SUPREME COURT OF NEW ZEALAND

SC 16/2017
[2017] NZSC 40

BETWEEN RICHARD LYALL GENGE
Applicant

AND SUPERINTENDENT OF
CHRISTCHURCH MEN'S PRISON
Respondent

Court: Elias CJ, William Young and Ellen France JJ

Counsel: Applicant in Person
K Laurensen and A M Smith for Respondent

Judgment: 28 March 2017

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant is currently serving a life sentence for murder imposed in October 1995.¹ He is detained pursuant to a warrant of commitment issued under s 143 of the Criminal Justice Act 1985 (the 1985 Act). His application for habeas corpus was dismissed by Nation J.² He now seeks leave to appeal that decision directly to this Court.³

[2] The applicant seeks leave to appeal to this Court primarily on the basis that the 1985 Act gave him rights and entitlements in relation to parole that have been

¹ Mr Genge was convicted and sentenced at the same time (to a concurrent term of 12 years' imprisonment) on one count of sexual violation by rape.

² *Genge v Superintendent of Christchurch Men's Prison* [2017] NZHC 20.

³ An appeal to the Court of Appeal under the Habeas Corpus Act 2001 was rejected for filing on the basis there was no appeal under that Act as Nation J found Mr Genge was not permitted to pursue the application. Mr Genge was advised he could pursue an appeal under the Court of Appeal (Civil) Rules 2005.

removed by the repeal of the 1985 Act and the application of the Parole Act 2002 (the 2002 Act) in its place. Mr Genge wishes to argue, amongst other matters, that the application of the Parole Act offends against the principle that penal enactments are not to have retrospective effect to the disadvantage of an offender.⁴ He also says he should have been given a hearing in the High Court.

[3] In the High Court, Nation J concluded Mr Genge's application sought to re-litigate two earlier determinations made by the High Court that his detention was lawful. That was a reference to judgments dismissing habeas corpus applications delivered by Mander J on 15 April 2015⁵ and 2 July 2015.⁶

[4] As the application raised no new matters, Nation J said that s 15(1) of the Habeas Corpus Act 2001 applied. That section provides that, subject to various appeal rights, no application can be made "on grounds requiring a re-examination by the Court of substantially the same questions" as those considered earlier. Because the legality of his detention had been determined earlier, Mr Genge's rights to have the validity of his detention decided had been exercised.⁷ It followed, the Judge said, that there was no right to a hearing on the application before him.

Our assessment

[5] No exceptional circumstances have been raised which would justify an appeal direct to this Court.⁸ In any event, the criteria for leave in s 13 of the Supreme Court Act 2003 are not met. Three points can be made.

[6] First, although Mr Genge says that there are questions that would be developed in relation to the warrant, the reality is that there is no challenge to the warrant which is the instrument under which he is detained. Mr Genge refers to a point dealt with in the first judgment of Mander J about the effect of the repeal of

⁴ Sentencing Act 2002, s 6(1). See also New Zealand Bill of Rights Act 1990, s 25(g); and Criminal Justice Act 1985, s 4(1) (now repealed).

⁵ *Genge v Superintendent of Christchurch Men's Prison* [2015] NZHC 705. Some references to the citation for this judgment record the year as 2014. That is an error reflecting what appears to be a slip in an initial version of the neutral citation for this case.

⁶ *Genge v Superintendent of Christchurch Men's Prison* [2015] NZHC 1523.

⁷ New Zealand Bill of Rights Act 1990, s 23(1)(c).

⁸ Supreme Court Act 2003, s 14 (which still governs the application by virtue of the transitional provisions in the Senior Courts Act 2016: sch 5, pt 2).

s 143 of the 1985 Act, under which the warrant was issued. That aspect was also addressed in Mr Genge's unsuccessful appeal from that judgment to the Court of Appeal.⁹ This Court refused to grant leave to appeal in relation to that decision.¹⁰

[7] Second, the proposed appeal would be directed towards his concerns about parole and, as this Court has previously noted, the habeas corpus proceedings do not provide an appropriate context for consideration of his parole issues.¹¹

[8] It appears that one of the underlying concerns about parole relates to the application of what the applicant says is a more onerous threshold for parole under the 2002 Act. We note that this aspect was addressed by Mander J in the judgment of 2 July 2015.¹² The Judge said no issue of retrospectivity arose. That was because there had been no change to the particular penalty, life imprisonment, to which Mr Genge was subject.¹³

[9] Finally, there is no indication a substantial miscarriage of justice arises from the fact there was no hearing before Nation J. The current application raised no new issues.

[10] Therefore, the application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent.

⁹ *Genge v Chief Executive of the Department of Corrections* [2015] NZCA 157.

¹⁰ *Genge v Chief Executive of the Department of Corrections* [2015] NZSC 88.

¹¹ At [4].

¹² *Genge*, above n 6.

¹³ At [9] citing *Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26, [2005] 3 NZLR 1.