IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA336/2019
[2024] NZCA 462

BETWEEN	KIRI PAUL PATIRA BRACKENRIDGE Applicant
AND	THE KING Respondent

Hearing: 26 August 2024

Court: Cooke, Peters and Grice JJ

Counsel: H G de Groot and T J Conder for Applicant
E J Hoskin for Respondent

Judgment: 20 September 2024 at 10.30 am

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is granted.

B The application for leave to withdraw the notice of abandonment is declined.

REASONS OF THE COURT

(Given by Cooke J)

[1] On 12 July 2019, Kiri Brackenridge was sentenced to life imprisonment, with a 10-year minimum period of imprisonment, for murdering his mother.[1] On 31 January 2020, he formally abandoned an appeal against conviction and sentence pursuant to r 35 of the Court of Appeal (Criminal) Rules 2001 (the Rules). By application dated 1 August 2023, he now applies for leave to withdraw that notice of

[1] *R v Brackenridge* [2019] NZHC 1627 [Sentencing notes] at [36(a)]. Mr Brackenridge was also found guilty of, and sentenced for, arson and dishonest use of a bankcard.

abandonment so that he may pursue an appeal against sentence. He seeks a finite sentence of imprisonment rather than a sentence of life imprisonment. The application is opposed by the respondent.

Background

[2] The relevant background is set out in the sentencing notes of the trial Judge, Jagose J.[2]

[3] At the time of the offending, Mr Brackenridge was suffering from what was described as drug-induced schizophrenia. He had been using methamphetamine heavily but after coming to dislike its effects Mr Brackenridge had stopped using it in September 2016. The offending occurred on 8 November 2016. Shortly afterwards testing revealed no traces of methamphetamine in his system.[3] But the expert evidence at trial was that his offending was, at least in part, caused by his mental disorder arising from methamphetamine use.[4]

[4] When he offended Mr Brackenridge thought that the "Sun God" had told him that his mother was evil, she was the devil, and that she was lying about his father's identity. In that state he travelled from Gisborne to Auckland to his mother's one bedroom unit in Mt Roskill. The two argued, Mr Brackenridge became upset, and he strangled and killed her. He then took her car and bank card. He used the card to make cash withdrawals from an ATM, effectively clearing her account. He drove to a petrol station and bought cigarettes and a small amount of petrol, before he returned to his mother's unit and used the petrol to set fire to the sofa inside the unit. It was engulfed by the fire and her body was discovered after the fire had been extinguished. After his arrest he said that he felt that he had accomplished a mission in killing her and needed to signal that to the Sun God, which he did by setting fire to the unit.

[5] At trial the sole issue was whether the defence of insanity applied, with psychiatric evidence called by both the prosecution and defence. The jury ultimately

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2 At [3]–[7].
3 At [26].
4 At [24].

determined that this defence did not apply and Mr Brackenridge was convicted of murder.

[6] Shortly after the offending Mr Brackenridge was remanded to a psychiatric clinic. His condition responded well to treatment and his remand continued in prison from February 2017. At the time of sentencing in 2019 he did not require in-patient psychiatric care and the reports of his time in prison were positive.[5]

[7] In sentencing Mr Brackenridge the key issue was whether a sentence of life imprisonment would be manifestly unjust under s 102 of the Sentencing Act 2002. The Judge considered it would not be. He addressed the case of *R v Reid* which Mr Brackenridge's counsel had argued was indistinguishable.[6] The Judge said:[7]

> [26] … No methamphetamine was detected in your body around the time of your offending, and your psychotic disorder had a life of its own, regardless of its origin. Still, in *Reid,* the defendant "was no longer a risk to [himself] and others". While his health issues required long-term care and control, the offending was characterised as being "against [his] entire life pattern".
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> [27] The same cannot be said for you. Your criminal history is minimal, but you have a long history with drug usage and its consequences. Your risk profile hinges on your drug use. The psychiatrist considers, in psychosis, you pose a high risk of violent offences of similar magnitude. I am not prepared to discount that risk, despite your willingness to address your addiction and corresponding mental health issues. Your willingness, for which I commend you, nonetheless has been within the confines and controls of prison. Your drug-use urge remains. Others suffering from schizophrenia at the time of offending have been sentenced to life imprisonment, even when their illness has improved with treatment. There is nothing in your case making life imprisonment "disproportionately severe".

Arguments on appeal

[8] In support of the application Mr Brackenridge and his then counsel, Ms Marie Dyhrberg KC, have filed affidavits describing the abandonment of the appeals. Leave was also sought to file a psychiatric report from Dr Gordan Lehany, dated 31 October 2023, providing a current assessment of his psychiatric state. In the circumstances we consider it appropriate to take this into account and leave is granted

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5 At [12].

6 At [25]–[26], citing *R v Reid* HC Auckland CRI-2008-090-2203, 4 February 2011.

7 Sentencing notes, above n 1 (footnotes omitted).

accordingly. At the hearing we also gave leave for Mr Brackenridge to file a report of his recent attendance at a drug treatment programme.

[9] For Mr Brackenridge Mr de Groot argued that Mr Brackenridge's abandonment of his appeal was not fully informed, and that combined with the underlying merits of the appeal leave should be granted to withdraw it. It was argued that the abandonment was a nullity because it was not the result of a deliberate informed choice, and that there were exceptional circumstances where the interests of justice required leave to be granted.

[10] In terms of the advice he received at the time, the evidence of Mr Brackenridge and Ms Dyhrberg was that the advice had focused on the conviction appeal, and that Mr Brackenridge was still suffering from the effects of the offending, including in association with the drugs he was taking at the time. Mr Brackenridge had accordingly not made an informed choice to abandon his sentence appeal.

[11] In terms of the merits of his appeal, Mr Conder argued that the approach to the application of the manifest injustice exception to life imprisonment arising from mental illness has been addressed in detail by the Supreme Court in *Van Hemert v R*, and the application of that approach meant that the exception applied, and a finite sentence should have been imposed.[8] The effects of mental illness had reduced Mr Brackenridge's culpability to a level that the default sentence of life imprisonment was inappropriate. Mr Brackenridge's actions were driven by his delusions about his mother and about other supernatural phenomena.

[12] The conclusion that the sentencing Judge reached to distinguish Mr Brackenridge's circumstances from that addressed in *Reid* — that Mr Brackenridge's actions were premeditated — was not significant because the premeditation was all the result of the same delusions that underpinned the offending. Any risk that Mr Brackenridge posed was associated with drug use and this risk had also been overstated by the Judge. Mr Brackenridge had consciously ceased using drugs in the lead-up to the offending. His relative youth, limited criminal history, and genuine remorse also suggested that the risk was overstated.

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8 *Van Hemert v R* [2023] NZSC 116, [2023] 1 NZLR 412.

Analysis

[13] In *Cramp v R* the grounds upon which a notice of abandonment of an appeal that was filed under r 35 of the Rules can be withdrawn were confirmed.[9] As the Court subsequently summarised in *Dickey v R*, leave to withdraw a notice of abandonment will only be granted in one of the following two situations:[10]

> (a) if the notice of abandonment of appeal was null and void because it was not the result of a deliberate and informed decision; or
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> (b) if, in exceptional circumstances, the interests of justice require a court to, in effect, set aside a notice of abandonment of appeal.

[14] We address the two potential grounds in turn.

Was the abandonment a deliberate and informed decision?

[15] Ms Dyhrberg explains in her evidence that she had arranged for advice to be given in relation to the proposed appeal from Mr David Niven, a barrister, who was to review both the conviction and sentence appeals. There is no written record of the advice. But Mr Brackenridge explains that he had a meeting by AVL with Mr Niven and Ms Dyhrberg to receive Mr Niven's advice. He also says that Ms Dyhrberg had explained that Mr Niven was going to advise whether the appeal was to be abandoned. He remembers Mr Niven speaking for a short time and that the advice was that there were no grounds for appeal. Mr Brackenridge says that he cannot remember if he talked about the conviction and sentence appeals separately. He also says that he did not challenge the advice for a number of reasons which he outlines, including that he respected and trusted Ms Dyhrberg. He says that his understanding was "not that there was a low chance of succeeding on appeal, but that there were no grounds".

[16] In her affidavit, Ms Dyhrberg says what Mr Brackenridge has said in his affidavit is factually correct, that upon reflection she could not be confident that what she had said to Mr Brackenridge about abandoning his sentence appeal would have been properly understood by him, and that if it was discussed by her at the time, it would have been brief. She says, in hindsight, that she doubts whether

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9 *Cramp v R* [2009] NZCA 90 at [20]–[26].
10 *Dickey v R* [2021] NZCA 600 at [7].

Mr Brackenridge had made a truly informed and independent decision to abandon his appeal. She does not explain what her own advice was at the time, although she says that Mr Brackenridge would have accepted what she had told him were the proper steps for him to take.

[17] We agree with Ms Hoskin's submission for the Crown that this evidence does not meet the standard contemplated for the abandonment to be treated as null and void. It is clear that separate legal advice on both the conviction and sentence appeal was obtained and that a decision was made to abandon the appeals as a consequence of the advice. The evidence from Ms Dyhrberg and Mr Brackenridge is to the effect that the advice encompassed both the conviction and sentence appeals, and that the appeals were not pursued because of the lack of grounds. While it is clear that the conviction appeal was the primary focus of the advice, it is also apparent that the advice encompassed a sentence appeal. We do not accept that a nullity arises because Mr Brackenridge cannot now remember if the conviction and sentence appeals were discussed separately, or because of Ms Dyhrberg's view that she is not now confident that Mr Brackenridge properly understood the advice relating to the sentence appeal. It is clear that Mr Brackenridge decided not to pursue an appeal after receiving advice from both Ms Dyhrberg and Mr Niven and that he did not question this advice for the reasons he explains. We accordingly consider that the abandonment was a result of a deliberate and informed decision.

Are there exceptional circumstances which justify leave in the interests of justice?

[18] In exceptional circumstances an abandonment can be withdrawn in the interests of justice notwithstanding the strong policy factors in favour of finality in the criminal law.[11] We consider that there is some analogy between this ground for the grant of leave and the grant of leave to bring an appeal out of time under s 248(4) of the Criminal Procedure Act 2011. Both turn on the interests of justice, albeit the exceptional circumstances element involves a higher hurdle. This category applies when a notice of abandonment has been filed as a consequence of a conscious and informed decision.

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[11] *R v Cramp*, above n 9, at [25]–[26]; and *Dickey v R*, above n 10, at [7].

[19] In *Kriel v R*, this Court considered the grant of leave to appeal out of time in relation to applicants who wished to argue on appeal that they qualified for the manifest injustice exception to life imprisonment for murder because of their youth at the time of the offending, and the subsequent development of the exception by this Court in *Dickey v R*.[12] When doing so, the Court referred to the approach set out in *R v Knight* in relation to the grant of an extension of time in the following terms:[13]

> … The touchstone is the interests of justice in the particular case. The discretion must be exercised in accordance with the policy underlying the legislative provisions. The feature which provides the reason for the time-limit for appealing set by s 388(1) is the interest of society in the final determination of litigation. That necessarily carries through as a powerful consideration in determining whether leave should be granted under s 388(2) to appeal out of time. The overall interests of justice in a particular case may call for balancing the wider interest of society in the finality of decisions against the interest of the individual applicant in having the conviction reviewed. Also relevant is "the respect which is traditionally shown for the liberty of the subject".[14]

[20] In *Kriel*, the Court granted leave in only one of the cases it was considering because the applicant may well have received a finite sentence on the principles outlined in *Dickey*, noting it was a "finely balanced conclusion".[15] For similar reasons, the grant of leave could be justified if Mr Brackenridge has good arguments that the exception to life imprisonment should have applied in his case and this is not outweighed by other considerations.

[21] We consider that Mr Brackenridge's case has similarities to that addressed in *Van Hemert v R*. In both cases the murder occurred as a consequence of mental illness. Both cases involved symptoms of schizophrenia related to drug consumption. As the Supreme Court said in *Van Hemert v R*:[16]

> [82] Mr Van Hemert lacks an inherent propensity for violence and the offending would not have occurred but for the onset of an uncontrollable psychotic episode. These facts point in favour of finding a sentence of life imprisonment to be manifestly unjust. That remains so despite the fact a defence of insanity was unavailable. Had it been, there would of course have been no need to sentence at all. In this case, the operative extent of mental

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12 *Kriel v R* [2024] NZCA 45, citing *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405.
13 *Kriel v R*, above n 12, at [80], citing *R v Knight* [1998] 1 NZLR 583 (CA) at 587.
14 *R v Hawkins* [1997] 1 Cr App R 234 at 239.
15 *Kriel v R*, above n 12, at [113]–[115].
16 *Van Hemert v R*, above n 8 (footnote omitted).

> impairment on the offending calls for a response going beyond adjustment of the minimum period of imprisonment imposed.
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> [83] Nevertheless, other sentencing principles require that conclusion to be set alongside public safety considerations, and it is here the appeal runs into real difficulty. Where a sentence of life imprisonment is necessary in the interests of public safety, this will suggest that such a sentence is not manifestly unjust. The psychiatric reports in evidence were prepared in May and October 2020 for the purpose of assessing fitness to plead (concluding affirmatively) and the availability of a defence of insanity (concluding negatively). They are very helpful indeed in assessing causation of the crime, but less so in relation to the issues arising under s 102: remorse and public safety.

[22] Two factors were then emphasised by the Supreme Court: first, that there was some doubt about the genuineness of Mr Van Hemert's expressions of remorse,[17] and secondly that there remained a concern in relation to the risk to the community, particularly given that substance abuse exacerbated, rather than triggered, a propensity for psychotic disorder.[18]

[23] In contrast Mr Brackenridge's remorse appears profound, and the psychiatric evidence does not suggest that Mr Brackenridge has an underlying psychiatric condition that is exacerbated by drug abuse, but rather that the drug use triggered the psychotic state that led to his offending. Further differences arise because of Mr Brackenridge's relative youth at the time of the offending, and because the victim was a close family member rather than a member of the community as was the case for Mr Van Hemert. For these reasons Mr Brackenridge has stronger arguments in favour of the exception to life imprisonment than Mr Van Hemert.

[24] Notwithstanding that conclusion, there are a series of countervailing considerations that are relevant.

[25] First, whilst Mr Brackenridge has an argument for the application of the manifest injustice exception on the basis of *Van Hemert*, it is a borderline case. There is a degree of uncertainty surrounding the way in which drug consumption had triggered his psychotic episode given the offending occurred some time after he had stopped using methamphetamine. It is also apparent that Mr Brackenridge faces

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17 At [85].
18 At [88].

addiction issues even though he appears to be effectively managing them within the prison environment. In those circumstances, the protective features associated with remaining on parole for life may still be appropriate.

[26] Secondly, the potential for the exception to life imprisonment arises because of changes made to the approach to the exception arising from the Supreme Court's decision in *Van Hemert*. On the approach applicable at the time of sentencing, the sentence imposed by the High Court was not surprising. As the Supreme Court noted in *Van Hemert*, the courts prior to that decision had rarely been persuaded that mental illness gave rise to the manifest injustice exception.[19] That did not mean that the exception could not apply to someone suffering from mental illness, as the decision in *Reid* illustrates. But the decision to abandon both the sentence and conviction appeals was understandable given the approach at the time. A change in the law does not, in itself, provide a basis for the grant of leave.[20]

[27] The third point relates to the amount of time that has elapsed since the appeal was abandoned, and the practicalities of the current circumstances. This was a factor referred to in *Kriel v R* as weighing heavily against the grant of leave.[21] It is over five years since Mr Brackenridge was sentenced. Two features of the sentence can arguably now be said to be excessive — the 10-year minimum period of imprisonment, and the continuation of the sentence (including the liability to be recalled to prison) for the remainder of Mr Brackenridge's life. Both need to be considered in light of the delay and the current circumstances.

[28] As to the first feature, in December this year Mr Brackenridge will have served eight years of the 10 year minimum term. Even if the Court were now to substitute a finite period of imprisonment so that he was eligible to be considered for parole, there would likely still be some time required for making further assessments and

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19 At [78], citing Simon France (ed) *Adams on Criminal Law — Sentencing* (looseleaf ed, Thomson Reuters) at [SA 102.02].

20 See *R v Knight*, above n 13, at 587.

21 *Kriel v R*, above n 12, at [114]. The Court found that a nine-year delay in the case of Mr Lo "weigh[ed] heavily against" the application, although it was ultimately granted. In the cases of Messrs Kriel, Nattrass-Bergquist, and Wallace-Loretz, however, delays of 13 years and seven years respectively were said to risk "significantly undermin[ing] the principle of finality" if the applications were granted, see [106(d)] and [109(d)]. Those applications were declined.

developing a release plan before Mr Brackenridge would likely be released by the Parole Board. The impact of the two further years should not be discounted, but on the other hand it cannot be regarded as highly oppressive.

[29] As to the second feature, Mr Brackenridge will remain subject to his sentence following any release on parole for the remainder of his life and will be liable to be recalled to prison for any breaches of parole conditions. Given that Mr Brackenridge has addiction issues and his offending was a consequence of illicit drug use, some risk to the public may remain associated with relapse. Any residual risk to the public may justify him remaining on parole for life and being subject to the ability for him to be recalled if the risk manifested itself. This kind of ongoing risk was referred to by the Supreme Court in *Van Hemert.*[22]

[30] The information before us suggests that Mr Brackenridge applies discipline to his current life, that he does not suffer from on-going psychiatric issues, and that he has attended relevant programmes directed to addressing his addiction issues. These are all highly positive features. But some residual risk may nevertheless remain. Any residual risk can be managed by the Parole Board in terms of his release, and the conditions of his release. We are not as well placed as the Parole Board to assess such residual risks. Moreover, if Mr Brackenridge continued with a positive life after release on parole, it is possible to apply for a variation or discharge of the conditions of parole under s 56 of the Parole Act 2002.[23] If those conditions were no longer necessary to manage any such risk they could and should be discharged.

[31] In these circumstances, it seems to us that there are processes to justly address Mr Brackenridge's case in accordance with his existing sentence, both in terms of when he can be released on parole and then in relation to the amount of time where he is subject to conditions on such release. Given those avenues, we ultimately do not consider that there are exceptional circumstances that make it in the interests of justice to grant leave to withdraw his notice of abandonment.

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22 *Van Hemert v R*, above n 8, at [83].
23 See *Dickey v R*, above n 12, at [184]–[193]; and *Van Hemert v R*, above n 8, at [75].

[32] Whilst he has an argument that the current approach to the manifest injustice exception may have been applicable to his circumstances, there are countervailing factors. We are not convinced that there is a significant injustice arising from Mr Brackenridge's existing sentence. The policy factors in favour of the finality of the criminal law mean that there is a high hurdle to overcome before the Court will grant leave to withdraw the abandonment of an appeal, and we are not satisfied that that hurdle has been met.

Result

[33] The application for leave to adduce further evidence is granted.

[34] The application for leave to withdraw the notice of abandonment is declined.

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