

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 77/2024  
[2024] NZSC 126

BETWEEN KINGI RATIMA  
Applicant

AND THE KING  
Respondent

Court: Glazebrook, Ellen France and Kós JJ

Counsel: E P Priest and J D Lucas for Applicant  
P D Marshall and D Dhir for Respondent

Judgment: 26 September 2024

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**JUDGMENT OF THE COURT**

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**The application for an extension of time to apply for leave to appeal is dismissed.**

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**REASONS**

**Introduction**

[1] In May 2016 Mr Ratima committed a violent robbery. He punched the victim and stomped on his head as he lay on the pavement. Mr Ratima then stole the victim's cellphone.

[2] As it was Mr Ratima's "third strike" offence, he was sentenced to the maximum term of imprisonment of ten years.<sup>1</sup> The Judge did not order that the sentence be served without parole, imposing instead a minimum period of imprisonment of five years.<sup>2</sup>

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<sup>1</sup> Sentencing Act 2002, s 86D(2) (since repealed).

<sup>2</sup> *R v Ratima* [2017] NZHC 252 (Gordon J) [HC judgment] at [33].

[3] This year, Mr Ratima sought an extension of time to appeal to the Court of Appeal against his sentence. After examining the merits of the proposed appeal in detail, the Court declined his application for an extension of time.<sup>3</sup>

[4] Mr Ratima now seeks leave to appeal directly to this Court against the High Court sentence, seeking an extension of time to do so.<sup>4</sup>

### **Grounds of application**

[5] Mr Ratima submits that his sentence was manifestly excessive and caused a substantial miscarriage of justice, in accordance with the principles set out by this Court in *Fitzgerald v R*.<sup>5</sup> He submits that his mental illness was not properly taken into account and has also not been appropriately treated in prison. This has prevented him from completing rehabilitation programmes and means that he has not been able to address his underlying criminogenic needs. In his submission, this constitutes a further breach of s 9 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights). He submits that the Court of Appeal did not properly apply *Fitzgerald*.

[6] The Crown submits that the application for an extension of time should be dismissed. In order to establish a risk of a substantial miscarriage of justice in terms of *Fitzgerald*, Mr Ratima must show that his sentence is so severe as to shock the national conscience.<sup>6</sup> The Crown submits that the Court of Appeal's judgment demonstrates that he is unable to do so. In the Crown's submission, any issues with his treatment in prison are not relevant to whether his sentence was manifestly excessive and there are other avenues to raise these complaints.

### **High Court sentencing**

[7] The High Court Judge said that she had no option but to sentence Mr Ratima to the maximum term of imprisonment prescribed for the offence, given that it was his

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<sup>3</sup> *Ratima v R* [2024] NZCA 254 (Katz, Dunningham and Gault JJ) [CA judgment].

<sup>4</sup> Mr Ratima accepts that that this Court does not have jurisdiction to hear an appeal in a criminal case against a refusal by the Court of Appeal to extend time for the filing of an appeal: *C (SC 22/2022) v R* [2022] NZSC 82 at [3]. He also accepts that ss 74 and 75 of the Senior Courts Act 2016 will apply to this application.

<sup>5</sup> *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551.

<sup>6</sup> At [79] per Winkelmann CJ and [167] per O'Regan and Arnold JJ.

third strike offence. She acknowledged that this sentence was disproportionate to the gravity of the offending but said that this is the intent of the “three strikes” regime.<sup>7</sup>

[8] In considering the issue of a minimum non-parole period, the Judge accepted that there were a number of aggravating factors increasing culpability, including the gratuitous violence with two unprovoked attacks to the head, the second when the victim was unconscious.<sup>8</sup> She also pointed to Mr Ratima’s extensive criminal history.<sup>9</sup>

[9] The Judge noted that, according to the pre-sentence report, Mr Ratima has a very high risk of reoffending and causing harm to others. He had reached his third strike warning in the space of only two years, which was particularly concerning to the report writer, given that he had been in prison for the vast majority of that time. Mr Ratima’s most recent offence had occurred only three weeks after he had been released from prison. The report also noted that he had, in some instances, rejected assistance from mental health services.<sup>10</sup>

[10] A psychiatric assessment dated 23 November 2016 had outlined Mr Ratima’s history of mental health issues that had been present since he was around 17 or 18 years old. The health assessor said that Mr Ratima had received a variety of diagnoses, including paranoid schizophrenia, psychotic illness and schizoaffective disorder, though bipolar affective disorder with psychotic symptoms appeared to be the most consistent diagnosis. The assessor also noted that he had alcohol and drug dependence issues as well as possible attention-deficit/hyperactivity disorder during childhood which also needed to be considered.<sup>11</sup>

[11] A further psychiatric assessment was ordered prior to sentencing. The Judge noted that Mr Ratima admitted to the report writer that he had consumed large quantities of illegal drugs immediately following his release from prison, including methamphetamine, cannabis and synthetic cannabis. He was also drinking heavily. This substance abuse had continued until his arrest and he had not been taking his

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<sup>7</sup> HC judgment, above n 2, at [17].

<sup>8</sup> At [22].

<sup>9</sup> At [24].

<sup>10</sup> At [8].

<sup>11</sup> At [10].

prescribed medication. For these reasons, the report writer concluded that his offending was independent of his mental health condition.<sup>12</sup> The report writer acknowledged that a sentence of 10 years' imprisonment without parole was likely to be onerous for Mr Ratima but considered that it would be no more onerous than for any other prisoner without Mr Ratima's mental health issues.<sup>13</sup>

[12] The Judge noted that Mr Ratima had pleaded guilty but in the face of a very strong case against him.<sup>14</sup> She noted that the mental health issues were not causative of his offending and considered any remorse shown to be limited in scope.<sup>15</sup> She accepted he was still reasonably young and had not had the opportunity to date to engage in rehabilitative programmes in any meaningful way.<sup>16</sup>

[13] She considered Mr Ratima's third strike offending to be "very similar" to the offending leading to the two previous convictions for robbery. She noted that the degree of violence had escalated over the course of the three offences. The Judge was also troubled by the speed with which Mr Ratima had accumulated the three convictions, "particularly given that this most recent offence occurred only three weeks after [his] release from prison". On the other hand, the Judge accepted that the culpability of the two earlier offences was not high, which was reflected in the relatively short sentences of imprisonment imposed.<sup>17</sup>

[14] The Judge considered this to be a difficult case with factors pointing towards and against a finding of manifest injustice. Ultimately, however, the Judge was satisfied that the:<sup>18</sup>

... gravity of the offending is sufficiently low that to impose a sentence of 10 years' imprisonment without parole would be manifestly unjust, particularly given the mental health difficulties ... and the lack of any real rehabilitative opportunities up until this point.

[15] She thus imposed a five-year minimum non-parole period.<sup>19</sup>

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<sup>12</sup> At [14].

<sup>13</sup> At [16].

<sup>14</sup> At [25].

<sup>15</sup> At [24].

<sup>16</sup> At [26].

<sup>17</sup> At [28].

<sup>18</sup> At [29].

<sup>19</sup> At [37].

## Court of Appeal decision

[16] The Court of Appeal (and indeed the Crown) accepted “that Mr Ratima’s sentence was disproportionate to the seriousness of his offending”.<sup>20</sup> It was also accepted that Mr Ratima had a complex and long-standing history of mental illness and that this was relevant when determining whether a sentence breaches s 9 of the Bill of Rights.<sup>21</sup>

[17] Despite these factors, and while Mr Ratima’s delay in filing his notice of appeal had been explained, the Court considered that his proposed appeal was not “sufficiently meritorious to weigh in favour of such a long extension of time”.<sup>22</sup>

[18] The Court said that, irrespective of the possible correlation<sup>23</sup> between Mr Ratima’s mental health and his offending and its mitigating effect on the seriousness of the offending, there would have been no difference in the nature of his sentence. It was not suggested by Mr Ratima that a sentence of imprisonment should not have been imposed absent the three strikes regime. The Court accepted the Crown’s submission that this case was some way away from *Fitzgerald*, where a non-custodial sentence was possible.<sup>24</sup>

[19] The Court did accept that Mr Ratima’s sentence was 2.55 times longer than the sentence that would have been imposed absent the three strikes regime and that the disparity in end sentence was just over six years. It did not consider this additional period to be justified by, or rationally connected to, the purposes or principles of sentencing set out in the Sentencing Act 2002. The same could be said of the longer non-parole period, “which was 2.55 times, and just over three years, longer”.<sup>25</sup>

[20] The Court noted, however, that this “disconnect from sentencing principles was an inherent feature of the three strikes regime”.<sup>26</sup> Further, Parliament did not

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<sup>20</sup> CA judgment, above n 3, at [37].

<sup>21</sup> At [38] and [39].

<sup>22</sup> At [61].

<sup>23</sup> Leave had been sought for the filing of a further psychiatric report. The issue of the admissibility of this further report had eventually been settled by the original report writer confirming that there was a possibility that Mr Ratima’s illness had some correlation to his offending: See at [44]–[47].

<sup>24</sup> At [49].

<sup>25</sup> At [51].

<sup>26</sup> At [52] citing *Pearce v R* [2024] NZCA 60 at [85].

extend the benefit of the repeal of the three strikes legislation to those who had already been sentenced, like Mr Ratima.<sup>27</sup>

[21] The Court accepted that Mr Ratima has complex needs, given his mental health and substance abuse history but pointed to cases where the Court of Appeal had held that “in some cases reduced moral responsibility might have to be countered by proper considerations of public safety”.<sup>28</sup> Thus, a mental illness or disorder that “manifest[s] in violence may require a deterrent and protective, rather than a mitigated, response”.<sup>29</sup> It considered that those observations apply with some force to Mr Ratima, based on his rapid accumulation of convictions for serious violent offending against randomly selected members of the public.<sup>30</sup>

[22] The Court noted that Mr Ratima has been eligible for parole since 3 February 2022. Under the Parole Act 2002, Mr Ratima “must not be detained any longer than is consistent with the safety of the community”.<sup>31</sup> The Court accepted the Crown’s submission that Mr Ratima’s sentence does not permit his continued incarceration beyond the point at which he no longer poses a risk to the community, unlike in *Matara v R*.<sup>32</sup>

[23] The Court did not consider that Mr Ratima was “plainly an inadvertent and unforeseen casualty of the three strikes regime”.<sup>33</sup> He is a repeat violent offender. The first and second strike offences “involved moderately serious, unprovoked violence on members of the public”.<sup>34</sup> Mr Ratima had previously been imprisoned for aggravated assault in 2011. And his “third strike offending was markedly more serious”.<sup>35</sup>

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<sup>27</sup> CA judgment, above n 3, at [52].

<sup>28</sup> At [57] quoting *R v Lucas-Edmonds* [2009] NZCA 193, [2009] 3 NZLR 493 at [36].

<sup>29</sup> CA judgment, above n 3, at [57] quoting *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 327 at [45]. See also *E (CA689/10) v R* [2011] NZCA 13, (2011) 25 CRNZ 411 at [69]; *Abdille v R* [2012] NZCA 119 at [25]; and *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37 at [47].

<sup>30</sup> CA judgment, above n 3, at [57].

<sup>31</sup> Parole Act 2002, s 7(1) and (2)(a).

<sup>32</sup> CA judgment, above n 3, at [59] referring to *Matara v R* [2021] NZCA 692, (2021) 30 CRNZ 808 at [68].

<sup>33</sup> CA judgment, above n 3, at [60].

<sup>34</sup> At [60(b)].

<sup>35</sup> At [60(b)].

[24] Although the Court accepted that Mr Ratima’s mental health had a role in his first and second strike offending,<sup>36</sup> it said that “there is no evidence that, at the time of sentencing for his first and second strike offending, his mental health was such that he failed to understand the consequences of his previous strike warnings”.<sup>37</sup>

[25] Overall, the Court considered that Mr Ratima’s sentence of 10 years’ imprisonment with a five-year maximum period of imprisonment does not appear so severely disproportionate that it shocks the national conscience.<sup>38</sup>

[26] The Court of Appeal also accepted the Crown’s submission that, because of the way in which Mr Ratima was dealt with in relation to further serious offending in prison, reopening his earlier sentence after such a long delay would tend to undermine the administration of justice by possibly “put[ting] him in a better position than he otherwise would have been in”.<sup>39</sup>

### **Our assessment**

[27] The criteria for granting leave to appeal are not met.<sup>40</sup> This Court has discussed s 9 of the Bill of Rights in the context of the three strikes regime in *Fitzgerald*. Mr Ratima’s proposed appeal does not raise issues of general or public importance beyond those already very recently considered by this Court.<sup>41</sup> Nor does anything raised by Mr Ratima suggest that the Court of Appeal’s analysis was flawed in a way that would suggest a risk of a miscarriage of justice. As the Court of Appeal recognised, it is not enough that a sentence is disproportionate. It must reach a level that would breach s 9 of the Bill of Rights. The offence in this case is much more serious than the offence in question in *Fitzgerald*. Also, as noted in the Courts below, Mr Ratima’s offending had been escalating in seriousness and committed over a short timeframe. As the Court of Appeal said, imprisonment would have been inevitable,

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<sup>36</sup> At [60(c)] referring to *New Zealand Police v Ratima* DC Hamilton CRI-2014-019-2404, 23 September 2014 at [3]; and *New Zealand Police v Ratima* [2015] NZDC 10787 at [5]–[6].

<sup>37</sup> CA judgment, above n 3, at [60(c)]. Although initially disputed, it was accepted that Mr Ratima received his strike warnings.

<sup>38</sup> At [61]. Its analysis summarised above had been conducted on the basis of the three factors in *Phillips v R* [2021] NZCA 651, [2022] 2 NZLR 661 at [4] and [34]: see CA judgment, above n 3, at [28].

<sup>39</sup> See CA judgment, above n 3, at [63].

<sup>40</sup> Senior Courts Act, s 74.

<sup>41</sup> We do not rule out that cases in the future may raise issues of principle not covered in *Fitzgerald*.

even absent the three strikes regime.<sup>42</sup> Mr Ratima's mental illness and alcohol and drug abuse mean that safety of the public is an important consideration.

[28] All this means that there are no exceptional circumstances justifying an appeal directly to this Court from the High Court decision.<sup>43</sup>

[29] Mr Ratima raises issues with what he alleges is a systemic failure of mental health services in prison which, he says, has affected his ability to access treatment and rehabilitation services. This could have had some relevance to his proposed appeal<sup>44</sup> but it would need evidence to establish whether he has in fact been deprived of treatment and the likely effect if so.<sup>45</sup> It would not be appropriate to conduct such an analysis without the views of the Courts below in the context of what is effectively a second appeal<sup>46</sup> and after such a long delay in making his leave application. As the Crown submits, there are other avenues available to air such complaints.

## **Result**

[30] The application for an extension of time to apply for leave to appeal is dismissed.

Solicitors:

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

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<sup>42</sup> CA judgment, above n 3, at [49].

<sup>43</sup> Senior Courts Act, s 75.

<sup>44</sup> For example in challenging the notion that the length of the term of imprisonment would be no more onerous than for a prisoner without mental health issues: see above at [11].

<sup>45</sup> We note, above at [9], that it appears Mr Ratima has at times refused to engage with mental health services. We also note, above at [10] and [11], his substance abuse issues and that he had not taken his prescribed medication in the period before the third strike offence.

<sup>46</sup> The Court of Appeal has already conducted a thorough analysis of Mr Ratima's case.