IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 75/2024
[2024] NZSC 140

BETWEEN	S (SC 75/2024) Applicant
AND	THE KING Respondent

Court: Glazebrook, Kós and Miller JJ

Counsel: S J Gray and S C Shao for Applicant
E J Hoskin and W J Harvey for Respondent

Judgment: 21 October 2024

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant[1] pleaded guilty to sexually offending against his partner's younger sister when she was 13 to 14 years old.[2] He was aged between 22 and 24 at the time. He was sentenced to 28 months' imprisonment by the District Court Judge.[3]

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1 The applicant's name has been anonymised in this judgment despite it not being suppressed, because identifying the applicant by name would risk breaching the complainant's protections under ss 203 and 204 of the Criminal Procedure Act 2011: see *S v R* [2024] NZCA 235 (Katz, Dunningham and Gault JJ) [CA judgment] at [1], n 1 citing *H v R* [2019] NZSC 69, [2019] 1 NZLR 675 at [54]–[58].

2 He pleaded guilty to three charges of sexual connection with a young person, three charges of attempted sexual connection with a young person and three charges of doing an indecent act on a young person under 16.

3 *R v S* [2023] NZDC 22959 (Judge Lummis).

[2] He appealed that sentence on the basis the Judge had given insufficient credit for personal mitigating factors, including youth, remorse and mental health, and the sentence was disproportionately severe in terms of s 8(h) of the Sentencing Act 2002. The thrust of the appeal was that a sentence of less than 24 months should have been imposed, opening the possibility of a non-custodial sentence.[4] That appeal failed, the Court of Appeal finding the sentence was not manifestly excessive.

[3] The applicant now seeks leave to bring a second appeal against sentence.

[4] He contends that registration on the Child Sex Offender Register (register) is a relevant factor that should be taken into account when determining the appropriate length of sentence, and ought to have influenced the discounts and end sentence he received. He suggests that registration should be capable of reducing the length of a sentence where an offender "is on the cusp between a custodial versus non-custodial end sentence, and there are factors that suggest registration is inappropriate."

[5] Secondly, he contends that where an offender carries a low risk of sexual reoffending, ongoing reporting obligations will achieve a punitive purpose only and hinder rehabilitative prospects by serving as a constant reminder of the past. He contends this could amount to disproportionately severe treatment, triggering both s 8(h) of the Sentencing Act and s 9 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights). He invites this Court to confirm whether, at the second step of the *Moses* sentencing methodology, a discrete discount may be available to an offender to counter this disproportionality.[5]

Our assessment

[6] We do not consider the criteria for leave are met here. While the two arguments advanced potentially raise issues of general importance,[6] we do not consider this an appropriate case in which to consider them inasmuch as neither ground was advanced in the Court of Appeal and we do not have the benefit of its views on them. Ordinarily leave would not be granted in such a case unless there was a real possibility

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4 CA judgment, above n 1, at [24].
5 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583.
6 Senior Courts Act 2016, s 74(2)(a).

that there had been a miscarriage of justice at first instance which went uncorrected on the first appeal.[7]

[7] As to that, we do not consider the prospects of success of the applicant on either argument are sufficient to infer any risk of miscarriage of justice such that it would be necessary in the interests of justice to hear the proposed appeal.[8] Entry on the register is mandatory where a custodial sentence is imposed, and is a penalty for the purposes of s 6 of the Sentencing Act and s 25(g) of the Bill of Rights.[9] However, even if the statutory imposition of registration was a relevant mitigating consideration—a point we do not decide—we consider it most unlikely, standing back, that the sentence imposed here could yet be found to be manifestly excessive.

Result

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

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

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7 *Bland v R* [2013] NZSC 93 at [6]; and *LM v R* [2014] NZSC 9, (2014) 26 CRNZ 643 at [2]. See also *Pavitt v R* [2005] NZSC 24 at [4]; *Kanhai v R* [2005] NZSC 25 at [6]; and *Mankelow v R* [2007] NZSC 57 at [2].

8 See Senior Courts Act, s 74(1) and (2)(b).

9 *D v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [59].