PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA279/06
[2007] NZCA 393

THE QUEEN

v

DAMON JOHN EXLEY

Hearing: 20 June 2007

Court: William Young P, Glazebrook and Chambers JJ

Counsel: A J Ellis and A W Rossiter for Appellant
B J Horsley and J M Davidson for Crown

Judgment: 7 September 2007 at 2 pm

JUDGMENT OF THE COURT

A Extension of time for appealing is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Chambers J)

A sentence of preventive detention

[1] Gendall J, in sentencing Damon Exley, the appellant, described him, at the age of 37, as "a hardened criminal". Mr Exley had a long criminal history – no fewer than 229 previous convictions, spanning a wide range of serious criminal offending, including kidnapping, aggravated wounding, indecent assault of a female, theft, and fraud. When he appeared for sentence before Gendall J, he was up on a large number of charges relating to offending in June 2005. All the offending was committed while Mr Exley was on parole.

[2] In early June, Mr Exley obtained property to the value of about $16,000 from hardware merchants in Christchurch, using an account in respect of which he had no authority. A week later, he persuaded a company to let him take a Range Rover for a test-drive. He failed to return it and drove to Nelson. On the way to Nelson, he checked into motel accommodation. He stole items from that motel worth about $5,000. He then drove to Nelson and stayed in another motel. The police located him in a bar in Nelson, but he managed to slip away while the police were speaking to his associates.

[3] Then, armed, he made his way back to Christchurch. There he arranged to take a Harley Davidson motorcycle for a test-drive, but failed to return it. It was subsequently recovered near the Marlborough Sounds. In the Marlborough Sounds, he stole an expensive motor launch valued at $230,000 and motored to Wellington. There he fraudulently obtained fuel and stole an assortment of men's and women's clothing from a communal laundry. His plan was to head for Tauranga and then Auckland, to steal another boat in Auckland, and then to travel to Australia to escape the authorities.

[4] In the meantime, however, he motored to the Mana Marina. He approached a local real estate firm and lured a female real estate agent to show him a number of properties. He had no intention of purchasing any of them. While the agent was showing him a property, Mr Exley produced a knife, threatened her, and demanded she remove her clothes. She was terrified and pleaded for her life. While, however,

Mr Exley was locking the outside doors, the agent managed to escape through a window. She ran to neighbours and called the police.

[5] Finding her gone, Mr Exley fled. He entered another property through an insecure window. He was found by the female owner hiding under a bed, armed with a large carving knife. He then escaped from that property, later that night to break into two camper vans.

[6] An extensive manhunt was now under way. Before the police could catch Mr Exley, however, he telephoned the police and handed himself in. He admitted all the offending in the course of his police interview. He said he had originally intended to rob the real estate agent of her motor vehicle, keys and money, but then decided to rape her when he saw an opportunity.

[7] Gendall J sentenced Mr Exley to preventive detention pursuant to s 87 of the Sentencing Act 2002. He ordered that he serve a minimum period of imprisonment (MPI) of eight years. Mr Exley now appeals against the sentence of preventive detention and the MPI.

Issues on the appeal

[8] We heard this appeal, at Mr Ellis's request, at the same time as the appeal by Ian McMillan (CA110/05). Mr Ellis was counsel for both Mr Exley and Mr McMillan.

[9] Mr Ellis's first argument was a systemic attack on the sentence of preventive detention. He submitted that the legislation permitting preventive detention breached in a number of respects the New Zealand Bill of Rights Act 1990 and provisions of the International Covenant on Civil and Political Rights. He also attacked the way in which sentences of preventive detention were managed by the Department of Corrections. That department's failures, he submitted, exacerbated the unfair nature of the preventive detention regime.

[10] The remedy sought was a declaration of inconsistency with the Bill of Rights and the covenant. The first issue we need to determine is whether such declarations are available on an appeal against sentence. We conclude they are not.

[11] Mr Ellis then advanced three arguments on Mr Exley's behalf. The first challenged the High Court's jurisdiction to impose preventive detention.

[12] The second argument challenged the justification for preventive detention in this case.

[13] The third argument was concerned with the length of the MPI. Mr Ellis submitted insufficient credit had been given for Mr Exley's surrender to the police.

The systemic attack

[14] Mr Ellis submitted the New Zealand regime of preventive detention was inconsistent with ss 9, 22, 23, and 25 of the Bill of Rights and arts 7, 9, 10, 14 and 15 of the Covenant. He submitted the penalty constituted cruel, inhumane, and degrading treatment.

[15] The attack was at two levels. First, he challenged what the legislature had done. He submitted the whole notion of an indeterminate sentence of imprisonment was unconstitutional, as every offender had a right to know his or her "possible release date". He further submitted that the regime punished offenders for offences they had not been convicted of and criminalised future acts. Finally, he submitted the regime required an assessment of future dangerousness which was arbitrary.

[16] Mr Ellis also challenged the way in which the Department of Corrections administers the preventive detention regime. In particular, he complained that the department did nothing about rehabilitating offenders until they had served their MPI. It then took, he said, a further year to two years "to complete the necessary rehabilitation before parole [became] a realistic option".

[17] The remedy he sought was a declaration that the preventive detention regime, both in inception and in practice, breached the Bill of Rights and the Covenant.

[18] We deal first with remedy. This court has already held it has no jurisdiction to make declarations of inconsistency in criminal proceedings: *Belcher v Chief Executive of the Department of Corrections* [2007] NZCA 174 at [16].

[19] Mr Ellis sought to get round that problem by asking for what he called "a *Hansen* declaration". That was a reference to the Supreme Court's decision in *R v Hansen* (2007) 23 CRNZ 104. In that case, the Supreme Court was considering the reverse onus imposed by s 6(6) of the Misuse of Drugs Act 1975. A majority of the Supreme Court considered that that provision was inconsistent with the right conferred by s 25(c) of the Bill of Rights. While the Supreme Court did not make a formal declaration to that effect, the majority, in their reasons for judgment, made their views on the inconsistency clear. Mr Ellis suggested we could do the same in the present appeal.

[20] We do not agree. *Hansen* was quite different. In *Hansen*, there was a legitimate question of statutory interpretation as to the correct meaning of s 6(6). The Supreme Court was justified in investigating the consistency of s 6(6) with the Bill of Rights, because s 6 of the Bill of Rights required the court to give an enactment a meaning consistent with the rights and freedoms contained in the Bill of Rights if possible. But there is no similar dispute here. The wording of s 87 of the Sentencing Act is clear. *Hansen* is not authority for the proposition that the courts are empowered to conduct what are effectively commissions of inquiry into acts of the legislature and executive to see whether they measure up to the requirements of the Bill of Rights and the Covenant.

[21] Mr Ellis's attack on the legislature here is effectively a political treatise in support of the abolition of the preventive detention regime. Section 4 of the Bill of Rights prevents us undertaking such an inquiry into the desirability or otherwise of such a regime. In any event, such an inquiry cannot sensibly be conducted in the context of a sentence appeal.

[22] It is even less practical to undertake in the present proceeding an investigation into the way in which the Department of Corrections is said to deal with prisoners subject to preventive detention. That department is not before the court. It has not had an opportunity to respond to Mr Ellis's complaints against it. If that department is administering the preventive detention scheme in an unlawful way, the appropriate course of challenge would be judicial review, with the department named as respondent: see, for example, *Wells v The Parole Board* [2007] EWHC 1835 (QB). Alternatively, a civil proceeding under the Bill of Rights for declaratory relief and damages could be brought: see, for example, *Taunoa v Attorney-General* [2007] NZSC 70. Individual prisoners could also utilise their rights under the corrections complaints system: see Corrections Act 2004, ss 151-160.

[23] We decline to embark upon a consideration of Mr Ellis's systemic attack, as these are not the appropriate proceedings in which such an attack can be mounted.

Was there jurisdiction to impose preventive detention?

[24] Section 88(1)(b) of the Sentencing Act stipulates that a court may not impose preventive detention unless it "has considered reports from at least two appropriate health assessors about the likelihood of the offender committing a further qualifying sexual or violent offence". "Health assessors" are defined in the Act: essentially, the term means psychiatrists or psychologists. In this case, Gendall J had before him three reports. Two had been obtained by the Crown: a psychiatric report by Dr Nick Judson, a consultant psychiatrist, and a psychological service assessment report by Ian Wootton, a senior psychologist with the Wellington Psychological Service. In addition, Mr Exley's then counsel had obtained a psychiatric report, that being by Dr Justin Barry-Walsh, a consultant forensic psychiatrist.

[25] Notwithstanding there being these three reports, Mr Ellis submitted there had not been compliance with s 88(1)(b) as two of the reports focused on "general recidivism rather than the specific focus required by s 88". That is to say, the reports were defective in that they were not confined to assessing the likelihood of Mr Exley committing a further qualifying offence. He submitted that, since there were not two

proper reports, "the court was precluded by s 88(1) … from imposing a sentence of preventive detention". He accepted his argument was technical, but cited Lord Woolf in *Brooks v Director of Public Prosecutions* [1994] 1 AC 568 at 582 (HL):

> Where the liberty of the subject is at stake, technicalities are important.

[26] There is nothing in this point. All three experts presented reports covering their assessment of the likelihood of Mr Exley committing further qualifying offences. The reports may not all have been of equal merit – or, indeed, of equal assistance to the sentencing judge. But all qualified as reports for the purposes of s 88(1)(b). Accordingly, there was jurisdiction for the High Court to impose preventive detention.

Was preventive detention justified?

[27] Gendall J, in imposing preventive detention, was heavily influenced by the fact that Mr Exley had, back in 2000, kidnapped another female real estate agent using a similar modus operandi to that which he had employed at Mana. On that occasion, he was convicted of kidnapping, indecent assault, and possession of an imitation firearm, and received a sentence of four and a half years' imprisonment.

[28] The judge was also much influenced by the experts' reports. In August 2005, a pre-sentence report was prepared. At that stage, Mr Exley had pleaded guilty to all the offending except that involving the real estate agent. It may have been envisaged at that stage that sentencing would take place with respect to the offences to which Mr Exley had pleaded guilty; as it turns out, that sentencing did not then take place.

[29] The August 2005 probation report was prepared by Tania Wairua-Orme, a senior probation officer. She noted that Mr Exley had a maximum security classification as a result of his history of escaping from custody. He has spent the majority of his life since the age of 15 incarcerated. He had reoffended during all periods when he was under community-based sentences, as well as while on bail. The offending was primarily related to his high level of substance abuse. His risk of

further reoffending was assessed as "very high" on the Department of Corrections' risk assessment tool (RoC*RoI). The probation officer concluded that, given the pattern and tendency for serious offending and the failure by Mr Exley to address the causes of his offending, he appeared to pose an ongoing and significant risk to the safety of the community. She also noted that Mr Exley was awaiting trial with respect to the kidnapping and indecent assault of the real estate agent. She concluded her report:

> If convicted of those offences and given the latest conviction for aggravated robbery, the Court may well give serious consideration to a sentence of preventive detention.

[30] In about April 2006, Mr Exley changed his pleas to guilty in respect to offending against the real estate agent. This led to a second pre-sentence report, this one by Phil Meredith, a senior probation officer. Mr Meredith noted Mr Exley's extensive history of previous offending, of which he considered two previous convictions for kidnapping and a previous conviction for indecent assault to be "particularly relevant". He also considered relevant the fact that Mr Exley had eight convictions for offences involving violence or threats of violence.

[31] Mr Meredith noted Mr Exley had been sentenced to imprisonment on 14 separate occasions. He had a history of escaping from custody (seven convictions) and of offending extensively while "on the run". He had breached conditions on each of his releases on parole and had on each occasion offended shortly after release. This probation officer too recommended preventive detention warranted "serious consideration".

[32] Dr Judson, the consultant psychiatrist, referred to the limitations falling on psychiatrists being able to predict future offending. He observed: "[a]ssessment of risk behaviour is inaccurate and inexact and the prediction of behaviour in the future is far more uncertain than prediction of behaviour in the short term." Those limitations are well known to sentencing judges and appellate courts: see *R v Peta* [2007] 2 NZLR 627 at [50]-[51] (CA). Dr Judson noted that Mr Exley had "an established pattern of offending since his teenage years, with very little time spent out of institutions". He thought Mr Exley had "developed little skill in surviving in the community or avoiding offending behaviours". He considered Mr Exley

remained "at considerable risk of continuing this pattern of similar offending behaviour in the future". He did not consider, however, there was an established history of "serious sexual offending", although he did note the similar offending in 2000.

[33] Mr Wootton's report was the most detailed. He referred to Mr Exley's rather depressing family background. He also reported on previous treatment provided to Mr Exley since 1987. None of that treatment appeared to have been successful.

[34] Mr Wootton referred to the RoC*RoI test. He said this actuarial measure had been found to be a reliable and accurate predictor of serious recidivism (81% accuracy). He said the measure "appears to accurately predict serious reoffending among men who are convicted of aggressive sexual offences if such offending is part of a versatile criminal history". He said Mr Exley had a RoC*RoI score that indicated a "very high" risk of serious recidivism within five years of release.

[35] Mr Wootton said Mr Exley had also been scored on the Static-AS test. This was an actuarial instrument "designed to estimate the probability of sexual and violent recidivism among adult males who have already been convicted of at least one sexual offence against a child or non-consenting adult". On the Static-AS test, Mr Exley scored "medium-high"; this meant Mr Exley was in a group with a medium-high risk of reoffending sexually within five years of release. Mr Wootton explained the significance of this.

[36] Mr Wootton explained that, as the Static-AS is based exclusively upon historical factors, it is necessary to regard that as a baseline assessment of risk, which might require adjustment by consideration of dynamic factors. He explained that the Sex Offender Needs Assessment Rating (SONAR) was one such measure of dynamic risk factors, focusing specifically upon sexual recidivism. He noted that that scale had shown "a moderate ability to differentiate between sexual recidivists and non-recidivists". He also explained that the utility of the SONAR in Mr Exley's case was limited by his then current incarceration, which affected the validity of the acute factors in particular. For that reason, the SONAR had been used qualitatively, to reinforce the clinical assessment, with specific reference to the period during

which Mr Exley committed his index offences in order to determine which of the dynamic factors had contributed to his criminal behaviour. Mr Wootton said that, for that period, Mr Exley had demonstrated some evidence of stable criminogenic needs relating to intimacy deficits, sexual self-regulation and general self-regulation, while acute factors affecting his immediate behaviour included negative mood and opportunities for victim access. In total, he regarded Mr Exley as scoring "low-moderate" on the SONAR at the time of his offending.

[37] Mr Wootton concluded:

> It is the writer's opinion that Mr Exley currently presents a very high risk of future general offending, and a medium-high risk of future sexual offending. Specifically, the developing pattern of his sexual offending, and his lack of awareness of the factors that contributed to these behaviours, indicate that his level of risk is enhanced. However, this long-term medium-high assessed level of static risk may be effectively managed through treatment focusing upon the dynamic risk factors that have been highlighted. Without such treatment, Mr Exley is unlikely to develop or maintain the skills required to avoid future offending of a general or sexual nature.

[38] Dr Barry-Walsh's report was more positive, but briefer. Like Dr Judson, he noted the conundrum of assessing risk for reoffending, given "someone's future risk of reoffending may be substantially modified by events and interventions that occur in the inevitable years of incarceration that lie ahead". He added: "In this area actuarial risk assessment tools may be of use in identifying someone as belonging to a group that carries with them a high risk, but this provides little information about how their risk might alter over an uncertain period."

[39] Dr Barry-Walsh expressed some optimism arising from the fact that Mr Exley had by that stage (15 May 2006) recanted from his previous denial of sexual offending and expressed considerable remorse. He concluded:

> There is no psychiatric disorder influencing his risk. I would observe that aside from the sexual aspect of his offending there are other concerning aspects to his offending including the crescendo nature and his apparent impulsivity. He has a substantial history of past offending and appears to have limited skills to live a more organised and pro-social life in the community. However if Mr Exley is able to engage in therapeutic interventions, as is his current expressed intention, and genuinely continue the self-reported process of personal change, then his risk of reoffending at the point of release may be substantially diminished.

[40] Mr Ellis made no criticism of Dr Barry-Walsh's report. He did, however, criticise Dr Judson's on two counts. First, he complained Dr Judson had employed no actuarial tools in his assessment. That is true – but nor did Dr Barry-Walsh, whose report Mr Ellis did not criticise. Further, the actuarial assessments were provided in Mr Wootton's report.

[41] Secondly, he complained that Dr Judson had assessed risk only "in a general sense", and had made no assessment of risk "with regard to the qualifying sexual or violent offence". That is not correct. As we have shown, Dr Judson considered Mr Exley remained "at considerable risk of continuing [his] pattern of similar offending behaviour in the future". It is to be remembered that Mr Exley's history included a number of qualifying offences, including kidnapping, aggravated robbery, aggravated wounding, and using a firearm against a law enforcement officer. That was quite apart from the 2000 incident involving the real estate agent. Further, the factors which the sentencing judge must take into account when considering whether to impose preventive detention are not limited to qualifying sexual and violent offences. The court is to be guided by "any pattern of serious offending" and by "information indicating a tendency to commit serious offences in future". The risk of future offending other than qualifying sexual or violent offending is, therefore, relevant.

[42] Mr Ellis's criticisms of Mr Wootton's report were primarily focused on what he said was Mr Wootton's attempt to assess "the risk of reoffending generally" rather than "the risk of the commission of the qualifying sexual or violent offence". We do not consider that is a fair criticism. Obviously all reports (regardless of the type of actuarial tool used) have their limitations; it was for the sentencing judge ultimately to make his assessment based on all the information available to him. In any event, the Static-AS and SONAR evaluations are specifically addressed to risk of *sexual* offending.

[43] In our view, it was open to Gendall J to conclude that Mr Exley was likely to commit a qualifying offence on release, if not sentenced to preventive detention. His Honour was justified in thinking there was a pattern of serious offending, particularly with respect to the offending against the two real estate agents. The very

extensive and varied pattern of past offending, as well as the current offending committed while on parole, was a good measure of risk.

[44] Mr Ellis tried to persuade us to review the evidence of a recent hearing before Baragwanath J in the High Court: *Department of Corrections v McDonnell* HC AK CRI 2005-404-000239. The case concerned an application for an extended supervision order under the Parole Act 2002. Professor Paul Barrett gave evidence in which he was critical of the way in which the Department of Corrections employed actuarial instruments. We are not prepared to take into account this "evidence" on this appeal. First, so far as we are aware, Baragwanath J has yet to release his decision. We do not know what he has made of Professor Barrett's evidence. Secondly, if the reports in this case were to be challenged, that should have been done by way of cross-examination at the hearing before Gendall J. It would be quite unfair to the report writers in this case to criticise them on the basis of incomplete evidence from another case entirely.

[45] We are not persuaded that the reports relied on in the present case were defective. Indeed, Mr Wootton's report and use of actuarial instruments appears exemplary. Psychiatric reports will always have a different focus, but the legislation allows these reports to be received and, in this case, they did address the question of risk in the future. Dr Barry-Walsh's report, while more helpful for Mr Exley, really went no further than saying there was some hope, given Mr Exley's expression of remorse and the possibility he would make genuine lifestyle changes. But Gendall J was entitled to be sceptical about those prospects, given Mr Exley's significant criminal history and the fact that the current spree of offending occurred while he was on parole. He was also entitled to be sceptical as to how much the remorse was prompted by Mr Exley's current predicament.

[46] In any event, the ultimate inquiry must be as to Gendall J's reasoning. The decision is ultimately one for judicial assessment, not assessment by experts: *R v Johnson* CA221/03 23 October 2003 at [19]-[20] and *R v D* [2003] 1 NZLR 41 at [59] (CA). With respect to that, we are satisfied preventive detention was available. The judge did consider the factors listed in s 87(4) and concluded that society did

need protection from Mr Exley, who did pose a significant and ongoing risk to the safety of its members.

Should the MPI have been shorter?

[47] The minimum MPI, where preventive detention is imposed is five years' imprisonment: s 89(1). By subs (2), the MPI must be the longer of –

> (a) The minimum period of imprisonment required to reflect the gravity of the offence; or
>
> (b) The minimum period of imprisonment required for the purposes of the safety of the community in the light of the offender's age and the risk posed by the offender to that safety at the time of sentencing.

[48] The section does not stipulate a maximum MPI.

[49] Gendall J was of the view that ordinarily a ten year MPI would have been justified. He was, however, prepared to give a two year discount (20%) for Mr Exley's guilty pleas. He was not minded to give a further discount for the surrender to the police, as the police were hot on his trail at the time of his surrender.

[50] Mr Ellis submitted Mr Exley should have received a further six months reduction on account of his surrender. We do not accept that. At the time of his surrender, Mr Exley was the subject of an extensive manhunt and would have inevitably been found. Further, he was at the time on parole. What is more, the discount for the guilty pleas was reasonably generous given the lateness of the pleas with respect to the most serious offending: see, eg, *R v Latifi* [2007] NZCA 372 at [13].

[51] We are not convinced the MPI was manifestly excessive or wrong in principle.

Conclusion

[52] All grounds of appeal fail. The appeal was filed slightly out of time, but the Crown takes no point on that. We grant an extension of time for appealing, but the appeal must be dismissed.

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