

ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS IN NEWS MEDIA OR ON INTERNET OR OTHER PUBLICLY ACCESSIBLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA451/2008
[2008] NZCA 356**

THE QUEEN

v

MARK GRAEME COLE

Hearing: 3 September 2008
Court: Glazebrook, O'Regan and Robertson JJ
Counsel: D A Ewen for Appellant
S J Mount for Crown
Judgment: 8 September 2008 at 3.00 pm

JUDGMENT OF THE COURT

- A The appeal is dismissed.**
- B Order prohibiting publication of the judgment and any part of the proceedings in news media or on internet or other publicly accessible database until final disposition of trial. Publication in Law Report or Law Digest permitted.**
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REASONS OF THE COURT

(Given by Glazebrook J)

[1] Mr Cole is charged with possession of methamphetamine for supply, possession of equipment and precursor substances, possession of magic mushrooms, receiving and unlawful possession of a modified firearm and a taser.

[2] Mr Cole lodged an application for bail in January 2008. This was adjourned by Gendall J for further evidence to be heard. In April 2008 Mr Cole lodged a second application, this time for electronic bail. The primary concern in relation to the bail application was Mr Cole's risk of re-offending while on bail. This was based on the fact that Mr Cole has been a heavy user of drugs, rather than any major history of re-offending while on bail.

[3] Clifford J, by a narrow margin, granted electronic bail on 8 April 2008. He considered that the risk of drug use and any associated criminal activity would be sufficiently controlled by release on electronic bail and by the fact that Mr Cole was to live with his mother. Now, however, Mr Cole has been granted a variation of bail so that he can live with his partner again.

[4] In July 2008 Mr Cole applied for a variation of bail conditions. He wanted to move from electronic bail to ordinary bail with a residence condition together with a curfew and reporting conditions. That application was refused by Gendall J on 23 July 2008.

[5] Mr Cole appeals against that decision. Mr Ewen submits on his behalf that:

- (a) Gendall J acted on a wrong principle; and
- (b) Gendall J failed to take into account relevant considerations.

[6] Mr Ewen submits that any bail conditions must be no more than is reasonably necessary to address the risk of re-offending. Gendall J articulated the test as being one of ensuring that there can be no possibility of offending whilst on bail. In Mr Ewen's submission, this led the Judge into error. Ordinary bail conditions are all that is reasonably necessary to address the risk of re-offending.

[7] While bail conditions must be logically related to the risk and no more than reasonably necessary to address it, Gendall J was quite justified in considering that ordinary bail conditions would fall far short of addressing Mr Cole's risk of re-offending. In any event, it was Mr Cole who applied for electronic bail, presumably accepting at that point that the electronic conditions were reasonably necessary to address the risk of re-offending. He now has to show a change in circumstances since Clifford J's decision. It is notable in this regard that Clifford J granted Mr Cole's bail application by a narrow margin and that one factor that influenced Clifford J in his grant of bail (Mr Cole's residence with his mother) now no longer applies.

[8] Mr Ewen next submits that there was a relevant change in circumstances. Mr Cole has successfully completed an eight week course and is undertaking on-going drug counselling. In Mr Ewen's submission, Gendall J failed to take Mr Cole's rehabilitative efforts into account.

[9] While Mr Cole's rehabilitative efforts are to his credit, we do not see that it could have made any difference to Gendall J's assessment. No doubt Gendall J saw it as subsumed in the general submission that Mr Cole had complied with all bail conditions (see below). There was certainly not enough information before the Court to conclude that Mr Cole had stopped using drugs and that this would continue even with relaxed bail conditions. Indeed, Mr Cole, in his police interview, admitted that he had made unsuccessful rehabilitative efforts in the past.

[10] As to Mr Cole's compliance with his bail conditions to date, again that is to Mr Cole's credit but it was certainly well within Gendall J's discretion to decide that some two and a half months of (even exemplary) compliance was not a reason to vary the bail conditions.

[11] For the above reasons, the appeal must fail.

Solicitors:
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