20/12 GGH SET 3

Secretary Justice v Wickliffe 16.12.88

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

T 195/88

IN THE MATTER of the Criminal Justice Act 1985

AND

IN THE MATTER of an application by the Secretary of Justice pursuant to Section 106 (1) of the Act for an Order that DEAN HUGH TIKAHU WILLIAM WICKLIFFE aka DEAN HUGH TE KOHU WILLIAM WICKLIFFE be recalled to continue to serve a sentence of imprisonment for life

BETWEEN THE SECRETARY OF JUSTICE
Wellington

Applicant

AND [redacted] WICKLIFFE aka DEAN HUGH TE KOHU WILLIAM WICKLIFFE of Mt Eden Prison, Prison Inmate

Respondent

Hearing: 6th December 1988

Counsel: M A Woolford for applicant
Respondent in person

Judgment: 16 December 1988

JUDGMENT OF TOMPKINS J

The Secretary for Justice has applied for an order that the respondent be recalled to continue to serve the sentence of imprisonment for life imposed by the Supreme Court at Wellington on 3rd May 1972.

On that day, the respondent had been found guilty of murdering Paul Miet on 10th March 1972. Between then and 1986 there were various appeals and applications to which I need not refer. In July 1986 there came before the Court of Appeal, a reference pursuant to s 406 (A) of the Crimes Act 1961. The decision of the Court delivered on 23rd December 1986 was that a verdict of guilty of manslaughter be substituted for the verdict found by the jury, but that no change be made in the sentence of life imprisonment.

The judgment of the Court delivered by Cooke P reported at [1987] 1 NZLR 55 at 65, sets out the reasons for the Court's conclusion that no change should be made in the sentence of life imprisonment. It emphasised that this was not for the purpose of punishing the respondent further. The Court considered that his release should be at as earlier date as reasonably practicable. But the Court took that course because it was sure that it would be against the interests of the public and of the respondent if he were released into the community unconditionally and without any kind of supervision or guidance.

The respondent was released on parole on 1st July 1987. The release was on the mandatory statutory conditions set out in s 100 of the Criminal Justice Act 1985 and on the following additional special conditions:

(a) That he reside at the address of Ms Jessie Stobie, 13 Kahuhu Street, Kaitaia, and

(b) That within fourteen days of his release, he undertake the work arranged for him by his supervising probation officer.

Following his release, he complied with the two conditions. Ms Stobie had been the person with whom the respondent had been living prior to his conviction, fifteen years before. Perhaps not surprisingly, the endeavour to re-establish a relationship was not a success.

From his release, the respondent was under the supervision of Mr Preston-Dickson, the probation officer at Kaitaia. The respondent described Mr Preston-Dickson's approach as friendly and that he did all he could to help the respondent. On 14th August 1987, he gave the respondent permission to move to the Otahuhu probation district and instructed the respondent to notify the Otahuhu probation office of his address and employment on or before 17th August 1987.

The respondent moved to Auckland. As a consequence of what followed, the respondent was charged with three breaches of his parole licence. He pleaded not guilty to all of them. After a number of Court appearances, he appeared on these charges before the District Court in Otahuhu on 23rd March 1988. No evidence was offered by the informant on the first

information and accordingly it was dismissed.

After hearing the evidence presented by the informant on the remaining two informations, the Judge dismissed those also. The informant has lodged an appeal by way of case stated against the dismissal of those two informations. That appeal has not yet been heard.

Mr Woolford accepted that having regard to the dismissal of the three informations in the District Court and the fact that the appeal by the informant in respect of two of the three not having been heard, this Court should not on this application, take into account those grounds set out in the application that alleged that he was in breach of the conditions of his parole and that the probation service is unable to offer any supervision to the respondent because of the respondent's non-cooperative attitude.

On the evening of 25/26 September 1987, the respondent was involved in a motor accident apparently while being followed by the police. He was charged with dangerous driving. On 13th October 1987 further charges of driving with excess blood alcohol and driving without a licence were laid. On 23rd March 1988 he was convicted of these three charges and a further charge of breach of bail as a result of his failing to appear in the District Court on 3rd December 1987 to answer the charges. On 4th August 1988 he was sentenced to ten days imprisonment on all charges except driving without a licence, on which he was

convicted and discharged. He was also disqualified from driving for six months on the dangerous driving and excess blood alcohol charges.

On 7th December 1987 a video store at Onehunga was robbed by a masked man armed with a sawn off double barrelled shotgun. After a defended hearing, the respondent was on the 4th July 1988, found guilty by a jury of charges of aggravated robbery and unlawful possession of a pistol. On 26th July 1988 he was sentenced to seven and a half years imprisonment on the charge of aggravated robbery and two years imprisonment on the charge of unlawful possession of a pistol, these sentences to be concurrent.

He applied for leave to appeal against these convictions. The judgment of the Court of Appeal was delivered on 1st December 1988. The application for leave to appeal was dismissed.

It is perhaps of some relevance to the present application that the charge of possession of the pistol did not arise out of the events relating to the aggravated robbery charge. The possession of a pistol charge resulted from his arrest in Lower Hutt on 15th December 1987.

Relevant to the present application are subss (1) and (5) of s 106. They provide,

> **106. Recall of certain offenders released on parole-**
> (1) Where an offender who is subject to a sentence

> of imprisonment for life, or to a sentence of preventive detention, is released on parole, any Judge of the High Court may, at any time while the offender remains subject to conditions following release, on the application of the Secretary, direct that the offender be recalled.
> (5) The powers conferred by this section may be exercised on such reasonable grounds as the Judge thinks fit, and whether or not the offender has committed a breach of any of the conditions of his or her release.

These provisions differ from their predecessors in s 36 of the Criminal Justice Act 1954. They provided that the power to recall an offender sentenced to life imprisonment was vested in the Minister of Justice. Ellis J in Secretary of Justice v Carl Bremner (M220/86 Wellington Registry, 3 September 1986) commenting on the provisions in s 106 of the 1985 Act observed,

> "The power (to recall) is now vested in the High Court and it is plainly discretionary the Judge being enjoined to exercise the power of recall on reasonable grounds. I understand this to be a direction to take into account the expressed social purpose of the Criminal Justice Act to rehabilitate offenders and balance this against the necessity to protect the public from further offending. Naturally the parolee's personal position must be considered too".

In Secretary for Justice v Convery (M9/67 Auckland Registry 4 December 1986) Speight J pointed out that whether or not the offender had committed a breach of any of the conditions of his or her release, is not a condition of the exercise of the discretion. At p 5 of the unreported judgment, he said,

> "I think the question of whether 'reasonable grounds' exist is determined by asking whether there appears to be a substantial risk that allowing the respondent to remain on parole is an undue risk to the safety of the public".

In my view, also relevant to the exercise of the discretion are the matters that the Parole Board is required to take into account, set out in s 96 (1) of the Act. They include the safety of the public and of any other persons who may be affected by the release, the likelihood of the offender committing further offences of violence upon his or her release, the welfare of the offender and any change in his or her attitude during the sentence and the nature of the offence.

Mr Woolford submitted that the events that occurred have demonstrated that the respondent has had access to illegal firearms, that he was prepared to use a firearm for the purpose of an aggravated robbery and that under those circumstances he must be regarded as a serious danger to the community.

Mr Wickliffe appeared on his own behalf. On his application I allowed him to have with him as a "McKenzie friend" Mr R W Coombridge. There were submitted submissions signed by the respondent and he also made quite detailed oral submissions.

In his written submissions he urged that the Court should not have regard to the conviction for aggravated robbery and possession of a pistol. This was, he submitted, because he had already been sentenced to seven and a half years imprisonment on the aggravated robbery charge and two years imprisonment on the possession of a pistol charge, so that to recall his parole on

the grounds of those convictions would mean that he would be punished twice for the one crime. That, he submitted, would be unreasonable.

In his oral submissions, Mr Wickliffe explained in some detail the history and his attitude to the events that occurred. He said that for sixteen years he lived in prison with a sense of grievance based on his belief that he had been unjustly convicted of murder. Then, when at last that conviction was reduced to manslaughter, he said the sense of grievance continued because the life sentence remained. He was unable to accept the life sentence. The injustice, he felt had not been removed.

However, he said that when he left prison he tried to put the past behind him. But his attempt to do so did not succeed. He considered that particularly after he came to Auckland, he was being harrassed by the police and the probation service made no real attempt to find him. He was unable to obtain employment, but he did work for four months without pay, trying to help young street kids. He also found the public image created by the media contributed to the problems. He said that in the events that occurred, it was inevitable that he would get into trouble again. He said that the good side of his character was never allowed to develop. He might have made it had he received help rather than harrassment.

I am not able to judge whether the assertions that he now

makes are justified by what occurred. But what he said to the Court illustrates vividly what his present attitude is, whether justified or not.

Declining the Secretary for Justice's application now would not of course mean that the safety of the public may be immediately affected because the respondent would not be released. He is serving a term of imprisonment of seven and a half years. To direct that he be recalled would mean that when he became eligible for parole in respect of that sentence, the Parole Board would be having regard not only to that offence, but also to the earlier offence. It would also mean that if he were not released on parole in respect of the aggravated robbery charge, but served the full sentence, he would still not be released, or to put it another way, he could then only be released on parole in respect of the manslaughter sentence.

I am satisfied that those considerations provide reasonable grounds for directing the recall. The events that have occurred since his release on 1st July 1987 have demonstrated that if he is at large without the help and support of other persons such as a sympathetic probation officer, assisted by the imposition of appropriate conditions, then the safety of the public may again be at risk. Indeed, there would be in view of his history, a likelihood of his committing further offences involving violence.

After he moved from Kaitaia, he had no supervision or

guidance. It is not for me to determine whose responsibility that was. But the fact is that without that supervision or guidance, as he himself put it, it was inevitable that he would get into trouble again.

Directing the respondent's recall does not involve punishing him a second time for the aggravated robbery conviction. I agree entirely with his submissions that it would be unreasonable and unjustified to direct a recall solely because of that conviction.

I can only express the hope that the respondent does not yet again feel a sense of grievance as a result of the decision that I am about to make. I am not punishing him for what he has done. I will direct the recall because I am convinced, not only from the events that occurred but also from his submissions to me in the Court, that when he is next released from prison, that release will only be successful and the other good side of his character will only develop if he has for quite a significant period, the support, guidance and encouragement of persons well qualified to provide this. The only way that the Court can be certain that that degree of supervision will be provided, is by directing that he be recalled.

I should make it clear that making such a direction will not in any way inhibit the Parole Board from releasing him again on parole at such time and on such terms and conditions as it

thinks fit.

For these reasons I direct that the respondent be recalled to serve the sentence of imprisonment for life.

Solicitor for the applicant:
Crown Solicitor (Auckland)

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