IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2009-404-163

UNDER	the Parole Act 2002
IN THE MATTER OF	an appeal under s 68 of the Act from a decision of the Parole Board to recall an offender to prison
BETWEEN	LEANNE ROSEMARY MACDONELL Appellant
AND	THE NEW ZEALAND PAROLE BOARD Respondent

Hearing: 23 June 2009

Appearances: Appellant in person
Austin Powell for Respondent

Judgment: 25 June 2009

JUDGMENT OF HARRISON J

In accordance with R11.5 I direct that the Registrar endorse this judgment with the delivery time of 3:00 pm on 25 June 2009

SOLICITORS
Crown Law (Wellington) for Respondent
(copy to Appellant in person)

Introduction

[1] Ms Leanne MacDonell pleaded guilty to and was convicted of charges of supplying methamphetamine and precursor substances in this Court in early 2004. She was sentenced to a total term of six years imprisonment. Her sentence commenced on 11 March 2004 and expires on 7 February 2010.

[2] Ms MacDonell was 43 years of age when sentenced and was a prodigious drug user who suffered from a dependency of some 30 years duration.

[3] Ms MacDonell became eligible for parole on 8 February 2007. The Parole Board was satisfied 7 May 2007 that she would not pose an undue risk to the safety of the community if she was released to Odyssey House in Auckland on home detention. Her release was subject to certain residence and other conditions. Ms MacDonell then appeared to be making positive steps towards rehabilitation and, in particular, ending her drug addiction.

[4] Unfortunately Ms MacDonell was the subject of an interim recall order made by the Parole Board on 19 March 2009. The specific ground was evidence of her recent commission of drug offences. The order was made final on 15 April. An application to review the recall order was dismissed on 6 May. Ms MacDonell is due to appear before the Board on or before 15 July for a further assessment.

[5] Ms MacDonell appeals against both of the Board's substantive decisions.

Circumstances

[6] Ms MacDonell's family have lived in Taupö for many years. Both her parents resided there but died while she was serving terms of imprisonment. Ms MacDonell's sister, Ms Donna MacDonell, who has constantly supported her, lives in the former family home at 108 Elizabeth Street, Taupö. Ms MacDonell's daughter, who is herself a drug user, lives with her husband and children at 16 Matuku Street.

[7] Ms MacDonell was discharged from the Odyssey House programme in February 2008 after completing 10 months of treatment. She was then making good progress on the path to rehabilitation. She was being supervised by the probation service in Auckland. She was allowed to transfer to the probation service in Taupö to live with her sister at 108 Elizabeth Street on 5 May 2008. Ms MacDonell complied fully with her conditions of release until March 2009. There was no evidence of an increase in her risk of re-offending or that she posed a risk to public safety.

[8] However, on 10 March 2009 police officers executed a search warrant on Ms MacDonell's daughter's home at 16 Matuku Street. Ms MacDonell herself was present at the time. The police were acting on information received from a registered drug informant who had advised that Ms MacDonell herself was dealing in methamphetamine and cannabis from her daughter's address. The police found 10 grams of cannabis in Ms MacDonell's possession. Also located at her daughter's address was a wallet containing $7,000 in cash and 0.8 grams of methamphetamine.

[9] Ms MacDonell appeared in the District Court at Taupö on 16 March on charges of possessing methamphetamine, possessing cannabis, and possessing utensils. She was remanded without plea on bail until 1 April. The probation service, in reliance on these events, applied to the Parole Board to recall Ms MacDonell on 19 March.

[10] Ms MacDonell appeared at the hearing of the recall application before the Parole Board on 15 April. The police subsequently withdrew the charges of possession of methamphetamine and utensils. The record does not contain an explanation of the reasons for this decision. Ms MacDonell pleaded guilty to the one charge of possessing cannabis when she appeared on 23 April. She was convicted and ordered to come up for sentence if called upon within 12 months.

[11] The summary of facts tendered to the District Court deleted all reference to discovery of methamphetamine and associated paraphernalia and the original assertion that when interviewed by the police on 10 March Ms MacDonell admitted living at her daughter's address. Instead she admitted babysitting there.

[12] Ms MacDonell's appeal is generated by a sense of injustice or unfairness. She argued her appeal personally, and with balance and clarity. In essence, her complaint is that the Parole Board acted on an incorrect factual premise – that she would be tried on all three charges of possession when two were later withdrawn, and that a miscarriage has resulted.

Parole Board

[13] Ms MacDonell was represented by counsel at the hearing before the Parole Board on 15 April. The evidence given was transcribed and is available. The panel convenor, Judge Deobhakta, opened the hearing by recording that the probation service had applied for a recall order on the ground that Ms MacDonell had committed an offence punishable by imprisonment. The Board heard submissions and questioned both the probation officer, Ms Knowles, and Ms MacDonell.

[14] The probation officer's concern was that Ms MacDonell was placing herself 'in a high risk situation'. Ms MacDonell had admitted to the officer after her arrest that she knew there was drug dealing activity at her daughter's property. The probation officer advised the Parole Board that the police officer executing the warrant confirmed the discovery of $7,000 at the property and that he personally found the bag of cannabis around Ms MacDonell's neck.

[15] In answer to questions from Board members, Ms MacDonell admitted that 'alarm bells were going off' about activities at her daughter's house. The transcript records Judge Deobhakta's expression of his satisfaction that there were justifiable reasons for recall. The only issue was whether or not the Board should exercise some discretion. He directed that Ms MacDonell's release situation be reconsidered within three months, and that a full report with 'concrete proposals' be submitted in the meantime.

[16] The Board's written decision does not give reasons. It simply records that it 'had no difficulty in coming to the conclusion that grounds were made out for [Ms MacDonell's] recall'. The decision concluded with a brief sentence that the recall order had been made:

> … on the grounds that Ms MacDonell has committed an offence punishable by imprisonment and thus given all the circumstances poses an undue risk to the safety of the community.

[17] The Board was of the opinion that there were no circumstances upon which it could exercise its discretion in Ms MacDonell's favour, 'given her past history and the charges she is facing at the moment'. At that stage, of course, Ms MacDonell was facing three possession charges.

[18] Ms MacDonell applied to review the Board's decision. The panel convenor, Judge Mahony, dismissed her application on 6 May.

Decision

[19] It is not in dispute that the probation officer was entitled to initiate an application for Ms MacDonell's recall: s 61 Parole Act 2002. The primary ground for recall is that 'the offender poses an undue risk to the safety of the community': s 61(a). Another is that 'the offender has committed an offence punishable by imprisonment, whether or not this has resulted in a conviction': s 61(c). The Board's jurisdiction to make a final recall order arises where it is satisfied on reasonable grounds that one or more of the s 61 grounds for recall have been established: s 66(1). An affirmative conclusion is subject to an overriding discretion, to be exercised according to the paramount criterion of the safety of the community: s 7(1). When making an assessment of whether an offender poses an undue risk, the Board must consider both the likelihood of further offending and the nature and seriousness of any likely subsequent offending: s 7(3).

[20] As noted, the probation service applied for Ms MacDonell's recall on the ground that she had committed an offence punishable by imprisonment. I accept Mr Powell's submission that the Board did not require satisfaction of commission of the offence according to any standard of proof, whether criminal or civil. All that is required, as Mr Powell notes, is for the Board to act reasonably: *King v Parole Board* [2007] NZAR 289, Keane J at 296. As a result the Board is entitled to rely on information or evidence even though it may not be strictly admissible in a Court of law.

[21] That is because, as Asher J explained: see *Shortland v Parole Board* HC AK CRI 2007-404-366 17 December 2007:

> [33] Thus the processes are different. The recall is not part of the criminal trial of the new charges, but rather a continuation of a process arising from the old charges. Those charges have already been tried in accordance with the presumption of innocence and other Bill of Rights safeguards. While an offender in a recall hearing faces a loss of liberty, that loss arises as a consequence of the previous conviction and the unexpired sentence arising from that conviction. It does not arise in the context of a criminal hearing.
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> [34] The commission of an offence is simply one of a number of grounds in s 61 triggering the resumption of an earlier sentence. I can see no reason why the onus of proving the commission of offences should be any higher than the onus of proving any of the other grounds for recall, which is what application of the presumption of innocence would demand. The Court needs only be "satisfied on reasonable grounds" that one of the grounds is made out in terms of s 66(1).
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> [35] As McMullin J said in *R v White* [1988] 1 NZLR 264, 268 (CA), applied in *King v Parole Board* at [22]:
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> > The phrase 'is satisfied' means simply 'makes up its mind' and is indicative of a state where the Court on the evidence comes to a judicial decision. There is no need for justification for adding any adverbial qualification.

[22] The Board's decision is unsatisfactory in a number of respects. It is based on a conflation of two discrete grounds. One is that Ms MacDonell had committed an offence punishable by imprisonment; the other, said to follow, is that she posed an undue risk to the safety of the community. There is no analysis or evaluation of the evidence in support. I accept Mr Powell's submission that the Board must by necessity act summarily and promptly. But where appeal rights are at issue this consideration does not excuse a failure to identify, however briefly, the evidential basis for the conclusion. However, Ms MacDonell's subsequent plea of guilty to and conviction on the charge of possessing cannabis retrospectively cures that defect and satisfies the statutory precondition to recall.

[23] I am primarily concerned at the manner by which the Board purported to exercise its discretion. Mr Powell is correct that the Board actually turned its mind to this issue. But that is not enough. The discretion must be exercised according to principle. A passing reference to Ms MacDonell's previous history and the nature of

the charges she was then facing is insufficient. Her previous history includes, of course, evidence of recent and effective rehabilitative steps.

[24] In this inquiry the touchstone is, as noted, the safety of the community, coupled with a prohibition upon detaining offenders any longer than is consistent with that objective: s 7(2)(a). The proper basis for the Board's refusal to exercise its discretion in Ms MacDonell's favour was the probation officer's evidence of police information, admittedly communicated through an informer, that Ms MacDonell was actively dealing in drugs.

[25] This ground was succinctly identified by Judge Mahony in his review decision as follows:

> [11] The fact that Police did not proceed with two of the charges in what appears to have been a plea bargaining exercise and that the summary of facts was altered accordingly, does not undermine the sworn evidence before the Parole Board, outlining what the Police discovered when they executed a Search Warrant at the daughter's home.
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> [12] Under Section 17(1) of the Act, the Board has a wide discretion to receive and take into consideration whatever information it thinks fit.
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> [13] The information relating to the possession of methamphetamine and utensils was very relevant to the decision of the Board even though it may have become irrelevant at the Court hearing where the two charges referred to were withdrawn leaving Ms MacDonell facing only a charge of possession of cannabis.

[26] The probation officer's evidence, if accepted, coupled with Ms MacDonell's admission that 'alarm bells' were ringing about activities at her daughter's residence and her readiness to place herself in what the probation officer described as 'a high risk situation', was a compelling sign that Ms MacDonell's well intentioned and hitherto successful attempts at rehabilitation had foundered. The regrettable inference was that she had reverted to drug use and dealing, and thus presented a danger to the safety of the community.

[27] This conclusion could have been stated succinctly and appropriately. Its inclusion may have pre-empted this appeal. Ms MacDonell was entitled to an explanation for her recall.

Result

[28] Ms MacDonell's appeal is dismissed.

[29] I add, for what it is worth, that if the Parole Board decides to release Ms MacDonell before her sentence expiry date, that imposition of a condition prohibiting her from visiting her daughter's address or from associating with her daughter and son-in-law anywhere other than at Ms MacDonell's sister's address may be effective.

Rhys Harrison J