
REASONS OF THE COURT

(Given by William Young P)

Introduction

[1] These cases raise the important issue of principle whether the Parole Board should take into account considerations of general deterrence in determining whether prisoners should be released on home detention or parole. They were removed into this Court from the High Court under s 64 of the Judicature Act 1908 because the arguments advanced require us to reconsider (albeit in a changed legislative environment) an earlier decision of this Court, *Hawkins v The District Prisons Board* [1995] 2 NZLR 14.

The current legislation

[2] Release on home detention and parole is governed by the Parole Act 2002, the relevant provisions of which provide:

7 Guiding principles

(1) When making decisions about, or in any way relating to, the release of an offender, the paramount consideration for the Board in every case is *the safety of the community*.

(2) Other principles that must guide the Board's decisions are—

(a) that offenders must not be detained any longer than is consistent with *the safety of the community*, and that they must not be subject to release conditions or detention conditions that are more onerous, or last longer, than is consistent with *the safety of the community*; and

...

(d) that the rights of victims (as defined in section 4 of the Victims' Rights Act 2002) are upheld, and submissions by victims (as so defined) and any restorative justice outcomes are given due weight.

(3) When any person is required under this Part to assess whether an offender poses undue risk, the person must consider both—

- (a) the likelihood of further offending; and
- (b) the nature and seriousness of any likely subsequent offending.

...

28 Direction for release on parole

(1) The Board may, after a hearing at which it has considered whether to release an offender on parole, direct that the offender be released on parole.

(2) The Board may give a direction under subsection (1) only if it is satisfied on reasonable grounds that the offender, if released on parole, will not pose an *undue risk to the safety of the community* or any person or class of persons within the term of the sentence, having regard to—

- (a) the support and supervision available to the offender following release; and
- (b) the public interest in the reintegration of the offender into society as a law-abiding citizen.

...

35 Direction for detention on home detention

(1) The Board may direct an offender who has applied for home detention to continue serving his or her sentence on home detention.

(2) The Board may give a direction under subsection (1) only if it is satisfied on reasonable grounds that—

- (a) the offender will not pose *an undue risk to the safety of the community* or any person or class of persons if he or she is detained on home detention rather than in a prison; and

...

(Emphasis added)

[3] The apparently simple issue which is raised for decision is whether references to “the safety of the community”, particularly in s 7(1) of the Parole Act, permit the Parole Board to take into account considerations of general deterrence when making parole and home detention decisions.

The broader legislative context

[4] This issue falls to be determined in a broader legislative context which necessarily requires consideration of the Sentencing Act 2002 which was passed at the same time, and as part of the same package, as the Parole Act.

[5] Under the Parole Act the default rule is that prisoners serving finite sentences of more two years imprisonment become eligible for parole on the expiry of one third of the nominal sentence (see s 84). That default rule does not apply in cases where the sentencing Judge has fixed a minimum period of imprisonment (“MPI”) under s 86 of the Sentencing Act. That section has been amended since it was first introduced and, in both its original and now its current form, has provided some problems for sentencing judges and indeed this Court. For present purposes, what is significant is that s 86 has always permitted deterrence considerations to be taken into account when deciding whether to impose an MPI. In *R v Brown* [2002] 3 NZLR 670, this Court held that this was so under s 86 in its original form and it is now explicitly provided for in s 86(2)(c).

[6] When imposing sentences of imprisonment of two years or less, a sentencing Judge must either grant or decline the offender leave to apply for home detention. Section 97(3) of the Sentencing Act now provides:

(3) The court may grant the offender leave to apply to the New Zealand Parole Board under section 33 of the Parole Act 2002 for home detention only if the court is satisfied that it would be appropriate to grant leave, taking into account—

- (a) the nature and seriousness of the offence; and
- (b) the circumstances and background of the offender; and
- (c) any relevant matters in the victim impact statement in the case.

In its original form, s 97 was expressed in terms which rather suggested that there was a presumption in favour of leave to apply being granted. The current wording (which is similar to that provided in the Criminal Justice Act 1985) permits the sentencing Judge to have regard to general considerations of deterrence in deciding whether or not to grant leave to apply for home detention. When s 97 was amended,

the Minister (the Hon Phil Goff) observed during the first reading debate (19 November 2003) 613 NZPD 10194 that the amendments were:

to make it clear that the law does not require that leave to apply for home detention be granted in the normal course of events. The amendments in the Bill emphasise that the court has the primary role of determining whether wider sentencing considerations – such as denunciation, deterrence, safety of the community, the offender’s background, information in the victim’s impact statement – make home detention inappropriate. This will reduce the number of offenders being referred to the Parole Board – which is currently declining 40% of those given leave to apply for home detention by the Courts.

[7] Decisions by sentencing Judges to impose (or not impose) MPIs and to grant or refuse leave to apply for home detention are susceptible to appeal in the ordinary way.

[8] Under the Parole Act decisions by panels of the Parole Board are not subject to appeal although there is an internal review process provided for by s 67 of the Act and, of course, the possibility of judicial review.

Hawkins v District Prisons Board

[9] This case concerned a refusal by the relevant District Prisons Board to grant parole to the appellant (who was serving a lengthy sentence for fraud).

[10] The case fell to be determined by reference to s 104 of the Criminal Justice Act 1985 which provided:

104 Matters to be considered when determining release on parole

In determining ... whether to release an offender on parole, the ... District Prisons Board shall consider the need to protect the public or any person or class of persons who may be affected by the release of the offender, and shall also consider the following matters:

- (a) Generally, the likelihood of the offender committing further offences upon his or her release:
- (b) The welfare of the offender and any change in his or her attitude during the sentence:
- (c) The nature of the offence:

- (d) In the case of an offender who is subject to an order for recall or an offender in respect of whom a direction for return has been made under section 94(6) of this Act, the reasons for the order or direction, as the case may be:
- (e) The policy directions (if any) given by the Minister under section 98 of this Act.

This section replaced what had earlier been s 96 of the Criminal Justice Act which provided that decisions as to parole were to be made having regard to, inter alia:

The safety of the public, and of any person or any class of persons who may be affected by the release of the offender.

Because the amendments were made in 1993 (which was after the appellant had been sentenced) both sections were considered to be material to his case. Also material was s 7 of the Criminal Justice Act which required courts to have regard to the desirability of keeping offenders in the community so far as that was practicable and consonant with the promotion of “the safety of the community”.

[11] The District Prisons Board had given two reasons for declining to grant parole, the safety of the public and the nature of the offending:

The Board takes the view that the safety of the public requires it to have regard to the integrity of the deterrent aspect of the High Court sentence. ... If Mr Hawkins is released after serving two years of his six years sentence, the Board’s view is that the safety of the public will be compromised, because the deterrent component of the High Court sentence will have been significantly minimised.

...

The Board’s view is that because Mr Hawkins played such a leading role in the events that led to the offences, and because his offending was of such magnitude, release on his first eligibility date would not reflect the nature of the offending and would undermine the general deterrent effect of the sentence.

[12] The appellant’s challenge to this decision by way of review proceedings was dismissed in the High Court by Hammond J in a decision reported at [1995] NZAR 129. Hammond J took the view that the Board had been wrong to take into account considerations of general deterrence which he saw as being a matter of sentencing, but had been entitled to take into account the nature of the offending. He

declined to remit the decision back to the Prisons Board for reconsideration, since it would still reach, in his view, the same decision.

[13] The appellant's appeal to this Court was dismissed.

[14] Cooke P did not agree with Hammond J that general deterrence was an irrelevant consideration. At 17 he applied *R v Rose* [1990] 2 NZLR 552 (CA), citing the following comment:

In many cases of sentencing for white collar crime the risk of reoffending by the particular offender is not great. The safety of the community, within the meaning of s 7 of the Criminal Justice Act 1985, nevertheless requires a sentence which may be deterrent to others.

At 18, he said that he was not convinced that the Board:

was not fully entitled to give decisive weight to the consideration that to release the appellant on parole after only one-third of his sentence had been served would tend to undermine or nullify the deterrent effect of a sentence in relation to white collar crime, the importance of which has been emphasised by the Courts for a number of years now.

Similarly Richardson J was of the opinion at 19 that “the protection of the public in white-collar fraud cases necessarily raises considerations of general deterrence.” Casey J at 20 stated that “the references to public safety in the matters set out in s 96 of the Criminal Justice Act for the Board's consideration encompass those aspects of general deterrence accepted over the years by this Court as an essential component of public safety.”

[15] *Hawkins* was cogently criticised by Robertson, “White Collar Criminals – Sentencing and Parole” (1995) 1 NZBLQ 164 at 166. He concluded that a parole decision “cannot logically take into account the requirement for deterrence”, a view which was based on the following considerations:

First, the observation that release after 2 years might undermine the deterrent effect of a 6 year sentence is truistic. If Boards are concerned about this prospect then no one should be released on the first eligibility date; in fact parole should be abolished.

Secondly, one of the effects of the length of the sentence is to determine the date of first eligibility for parole. If Hawkins had been sentenced to 5 years' imprisonment he would have been eligible for parole earlier. If he had been

sentenced to 7 years' he would not have been eligible for parole until later. In realistic terms this must be part of the deterrent effect of the sentence. The sentencing court's view of the seriousness of the offence therefore determines the date that the Board first gets the opportunity to consider parole. This suggests that parole decisions should depend only what has occurred since the sentence was imposed and not on matters to be taken into account by the sentencing Judge.

Thirdly, there is a question of parity with other prisoners. One of my assumptions was that sentences of equal length reflect offending of equal seriousness. It is already the case, by statute, that a 6 year sentence for violence is worse than a 6 year sentence for theft [this because in cases of serious violence there was no parole eligibility until the expiry of two thirds of the nominal sentence]. Apparently, now there is another category of offences given the inexact and non legal title "white collar crime" for which effective eligibility for parole will be discretionarily delayed so that a 6 year sentence for such an offence is worse than a 6 year sentence for some things, but not as bad as a 6 year sentence for violence. Unfortunately we have no idea what this category consists of (save that it sounds suspiciously like discrimination by socio-economic class) nor for how long parole would be delayed.

While there is a somewhat polemical tone to these criticisms, they nonetheless warrant careful consideration.

[16] On the other hand, in *R v Brown*, this Court plainly saw *Hawkins* as being of continuing relevance under the sentencing and parole regime introduced in 2002. As earlier noted, *Brown* involved the proper implementation of s 86 of the Sentencing Act and in the course of discussing that this Court referred to *Hawkins*:

[24] We are not to be taken, from what we have said, to be suggesting that the considerations of the sentencer and those of the parole board should be mutually exclusive. Necessarily there will be overlap in the respective assessments made, of course, at different times. This is evident from the approach taken by this Court to the expressions "the need to protect the public" and "the safety of the public". They were held to encompass general deterrence and the views expressed would apply equally to "the safety of the community": see *Hawkins v District Prisons Board* [1995] 2 NZLR 14. That there is overlap does not mean there is double punishment. The assessments are made for different purposes which are quite consistent.

The cases at hand

Overview

[17] The issue which we are required to address has comparatively little, if any, significance, for the individual plaintiffs given either subsequent events or other

reasons which justified the various refusals of parole or home detention. But their cases nonetheless illustrate the way in which the current system is operating, at least in cases which come before Parole Board panels convened by Judges who take the *Hawkins* approach to the current legislation.

Reid's case

[18] Mr Reid was sentenced on 4 April 2005 to an effective term of 19 months' imprisonment on charges of dangerous driving causing death, dangerous driving causing injury (in relation to two people), failing to stop and driving while disqualified (on two occasions). He had pleaded guilty to all charges. Leave to apply for home detention was granted.

[19] As required by s 7(1)(f) of the Sentencing Act 2002, the sentencing Judge took into account deterrence:

[113] In respect of the factor of deterrence, I am prepared to accept, on the basis of the pre-sentence report and the other material which has been put before me by Mr Eaton, that you do not now represent a real risk on our roads. Indeed it is fair to note that there is no suggestion of any further offending by you since February last year.

[114] However, the factor of general deterrence must nevertheless be a real factor in the sentencing outcome today.

[20] Deterrence was also taken into account by the Parole Board when it refused Mr Reid's application for home detention under s 33(1) of the Act (ie for what is usually known as "front end home detention"). In its decision of 3 June 2005 it stated:

In considering this application for home detention we must have regard to matters referred to in sections 7 and 35 of the Parole Act 2002. The question is whether Mr Reid would pose an undue risk to the safety of the community if he was detained on home detention. Undue risk is not only directed towards the question of whether a person will go on to commit an offence if granted home detention. It includes issues of the nature and seriousness of the offence and the question of deterrence both to Mr Reid and to the public generally. These issues are directly related to the safety of the community.

[21] In reviewing the decision of the Parole Board, Judge D J Carruthers, the chair of the Parole Board referred to *Hawkins* as permitting the Board to take into account:

wider considerations in assessing the safety of the community which include aspects of general deterrence.

[22] In a further decision of the Parole Board (which is undated, but would have been around 5 October 2005), Mr Reid was permitted to serve the final three months of his sentence on home detention.

Bindon's case

[23] Ms Bindon was sentenced on 1 December 2003 to an effective term of six years' imprisonment and to pecuniary and penalty orders under the Proceeds of Crime Act 1991 for four offences relating to dealing in the Class B drug morphine.

[24] She applied for home detention under s 33(2) of the Act, which provides that applications may be made in the last five months before the offender's parole eligibility date, for what is known as "back end home detention".

[25] On 28 January 2005 the Board refused her application saying:

You argue that there is a small risk of reoffending and that will not reduce by keeping you in prison. The object of imprisonment is deterrence, not only so far as you are concerned, but also for others who might be tempted to offend in this fashion.

Again, we have to consider the seriousness of the offending and public expectations that persons serving long sentences do not get released for frivolous reasons at the very first opportunity necessarily.

[26] This decision was confirmed on review on 4 April 2005. At [5] the Judge said:

The Board is entitled to have regard to general deterrence in assessing the safety of the community as it is required to do above all else under s 7. The approach of the Court of Appeal in *Hawkins v District Prisons Board* [1995] 2 NZLR 14 remains valid notwithstanding the application of equivalent provisions of the Criminal Justice Act 1985 in that case.

[27] On 27 May 2005 Ms Bindon was once again before the Parole Board on an application for parole. In refusing the application, the Board expressly adopted the reasons, including the comments on the purpose of general deterrence, of the two home detention decisions.

Staples' case

[28] On 6 May 2004, Mrs Staples was sentenced to five years' imprisonment for 421 charges of fraudulently using a document with intent to defraud and four charges of false accounting. In imposing this sentence, the sentencing Judge referred generally to deterrence principles.

[29] On 29 July 2005 the Board rejected Mrs Staples' application for home detention. It said:

Our view is that quite apart from the risk, we are entitled in considering that question [of release on home detention], to look at the serious nature of the of the offending and also the deterrent aspect of the sentencing. *Hawkins* case, a decision of the Court of Appeal has not as yet been reviewed and unless and until the Courts say that *Hawkins* is no longer to be applied, our view is that in assessing risk we must inevitably take into account the serious nature of the offending and issues of deterrence.

[30] An application by Mrs Staples for parole was dismissed on 26 August 2005. On this occasion, the parole board panel did not rely on considerations of general deterrence and dismissed the application for other reasons.

[31] Further applications for back end home detention were refused on 16 December 2005 and 23 February 2006 respectively.

Discussion

[32] The issue we must determine is closely balanced.

[33] There is a good deal to be said for the approach taken by the Parole Board panels in the cases which are before us.

- (a) The key words in s 7(1), "the safety of the community" are very similar to the corresponding words in s 104 of the Criminal Justice Act, "the need to protect the public". The expression "safety of the community" also appeared in s 7 of the Criminal Justice Act and in

that context, as Cooke P noted in *Hawkins*, it plainly encompassed considerations of deterrence.

- (b) Sections 28 and 35 of the Parole Act mean that parole and home detention cannot be granted unless the Parole Board is satisfied that the offender will not pose an undue risk to “the safety of the community” if granted parole or home detention. In that context “the safety of the community” has the connotation of safety from the undue risk of re-offending by the offender. That the legislation makes specific provision for the assessment of that risk suggests that the phrase “the safety of the community”, particularly where it appears in s 7(1) of the Parole Act, may embrace considerations which go beyond the risk of reoffending.
- (c) Further, on the plaintiffs’ argument, parole eligibility essentially depends on an assessment of the offender’s risk of re-offending, and if this was intended by the legislature it would have been very easy to say so.
- (d) That victims have a role to play in the process might also be thought to suggest the relevance of considerations which go beyond the risk of re-offending.
- (e) It is simplistic and incorrect to treat parole decisions as involving sentencing, see Richardson J in *Hawkins* at 19. The same must apply to decisions as to release on home detention. So the criticism that the taking into account of general deterrence in relation to parole and home detention involves “re-sentencing” is misplaced.
- (f) The judgment in *Brown* proceeds on the basis (albeit *obiter*) that *Hawkins* remains applicable to the sentencing and parole regime introduced in 2002.

[34] There are, however, considerations which go the other way.

- (a) It is open to sentencing Judges, at the time of sentencing, to make specific allowance for deterrence. Deterrence is of course relevant to the fixing of the length of the nominal sentence. But more relevantly for the present purposes, if the sentencing Judge is of the opinion that parole eligibility at the expiry of one third of nominal sentence is inconsistent with the requirements of deterrence, that can be allowed for by imposing, under s 86, an MPI in relation to sentences of more than two years imprisonment. Likewise a sentencing Judge who considers that release on home detention would inappropriately detract from the deterrent effect of a sentence of two years imprisonment or less, can withhold leave to apply for home detention. We recognise that there is no jurisdiction under s 86 of the Sentencing Act to impose an MPI which exceeds two thirds of the nominal sentence and likewise no jurisdiction for a sentencing Judge to exclude the right to apply for back end home detention. So continuing to apply the *Hawkins* approach in those cases (ie where an offender is detained after the expiry of two thirds of nominal sentence or refused back end home detention) would not involve any overlap with sentencing powers. But these lacunae seem to us to be of less practical significance than the overlap in relation to release on front end home detention or on parole prior to the expiry of two thirds of sentence length.
- (b) In these respects, the relevant legislative environment has evolved significantly since 1995 (ie when *Hawkins* was decided). At that time, there was no power to impose an MPI (other than in the very different context provided for by s 80(4) of the Criminal Justice Act). If deterrence considerations were not available to the District Prisons Board, prisoners serving sentences for white collar crime (who were often unlikely to re-offend) were in many cases going to be able to secure release on parole on the expiry of one third of nominal sentence length.

- (c) It will be recalled that s 104(c) of the Criminal Justice Act referred to the “nature of the offending”. This reference is not replicated in the corresponding provisions of the Parole Act. The reference in s 7(3)(b) of that Act to the “nature and seriousness” of offending is expressly confined to likely further offending and only relevant to the question whether an offender poses “an undue risk”. In the home detention context, “the nature and seriousness of the offence” is relevant to the decision by the sentencing Judge whether to grant leave to apply for home detention (see 97(3) of the Sentencing Act) but not to the decision by the Parole Board whether to release an offender (see s 28 of the Parole Act). The nature and seriousness of the subject offending is, of course, likely to be relevant to the assessment of an offender’s risk of re-offending.
- (d) Although parole and home detention decisions are not part of the sentencing process and thus taking into account general deterrence does not involve “re-sentencing”, resort to general deterrence in respect of such decisions in the current legislative environment looks much more like re-sentencing than the refusal of parole in the *Hawkins* case. It is certainly understandable that this is the way the process would be viewed by those who are affected by it.
- (e) Deterrence can be better addressed by the sentencing Judge than by the Parole Board. Offenders are sentenced in public; full reasons are given and there are full appellate rights which, if exercised, result in a further public and reasoned decision. The system is transparent and at least reasonably consistent. Parole board panels sit in private there are no rights of appeal. There are internal rights of review (under s 67 of the Act) and as well the right to apply for judicial review. But neither right (ie to apply for review under s 67 or for judicial review) provides a particularly suitable mechanism for reviewing decisions based on considerations of deterrence and particularly in terms of ensuring a reasonable measure of parity of treatment between offenders of similar culpability.

- (f) The default one-third rule for parole eligibility and a high level of discretion vested in the Parole Board produces the potential for major disparities in treatment between offenders of similar culpability. If two offenders are sentenced to the same sentence (presumably on the basis that their culpability is broadly equivalent) one may have to spend three times as long in jail as the other. Such an outcome is acceptable if the reasons for it are associated with post-sentencing assessments of an offender's risk of offending but less so if it results from what looks rather like a re-sentencing exercise carried out by a parole board panels and based on general deterrence considerations.
- (g) The lack of publicity given to Parole Board parole and home detention decisions means that they have no little practical deterrent value. The operation of the parole system is complex and by no means easy for the public to grasp. The practical impact of refusing parole and home detention in individual cases is thus unlikely to have an appreciable impact on the perceived operations of the criminal justice system, particularly where there are often other reasons why parole or home detention might be refused (as for instance in the case of Mrs Staples).
- (h) Although, as noted, there were obiter comments in *Brown* in which *Hawkins* was approved, the point in issue here was not the subject of detailed (if any) argument.

[35] Our analysis of the parliamentary history provides at least some support for the plaintiffs' position. As to this, it is perhaps simplest to refer to the Report of the Justice and Electoral Committee on the Sentencing and Parole Reform Bill. In that Report, the Committee made a number of comments the most significant of which we emphasise. First, the Committee observed at 29:

[M]ost of us ... recommend the addition of a new cl 169(3) to clarify "undue risk". *When deciding on a person's suitability for release from prison the Board must now take the safety of the community as its paramount consideration. We agree, when the Board assesses whether an offender poses an undue risk, that consideration must include both the likelihood of further offending and the nature and seriousness of that subsequent*

offending. ACT considers that this does not address the key problem which is the deterrent and denunciation purpose of punishment.

Then, at 30 in the context of the participation of victims and parole procedures:

Some of us are satisfied that these provisions in general will allow victims of offending an opportunity to participate in, and be heard in, parole hearings if they so desire. It must be stated however that the purpose of a victim's input must to be assist the Board in making a decision. The focus therefore should be assessing the risk to the safety of the community and not merely a restating of the harm done.

Then, addressing specifically eligibility for parole at 32:

Most of us are of the view the safety of the community should be the central issue in a parole decision and that the defendant should not be detained in custody longer, or be subject to conditions that last longer or are more onerous, than is consistent with the safety of the community. The portion of the sentence prior to parole eligibility should be considered the part that must be served in order to maintain the integrity of the sentence. After that, offenders should continue to be detained if they pose an undue risk to the safety of the community for at least during the period when they would otherwise have been serving the sentence imposed on them.

[36] We consider, as well, that the debate in Parliament on the amendment to s 97 as to home detention (see [6] above) also tends to support (or at least is consistent with) the plaintiffs' approach.

[37] As is apparent from what we have said, we see this case as closely balanced. We are, however, of the opinion that the plaintiffs' argument should be accepted essentially for the following reasons.

- (a) If the issue fell to be determined solely by reference to the current form of the parole and sentencing legislation the most obvious interpretation of the relevant sections is along the lines contended for by the plaintiffs. This is because the phrase "safety of the community" most obviously refers to the sort of safety which is compromised by re-offending.
- (b) The arguments to the contrary very largely depend on legislative history and particularly the absence of any clear legislative repudiation of *Hawkins*. These are powerful considerations but, in

the end, not of controlling significance primarily because the general legislative scheme is so different from that considered in *Hawkins*. This is particularly so in terms of the ability of sentencing courts to allow for deterrence considerations on sentence (either by declining leave to apply for home detention or by imposing MPIs) and the absence of any provision in the Parole Act which corresponds to s 104(c) of the Criminal Justice Act.

- (c) Although evidence of legislative intention is exiguous, our impression is that Parliament did proceed on the basis that parole board panels would not re-engage in what looked like exercises in re-sentencing.
- (d) We see this approach as most consistent with principle (particularly in light of the arguments referred to above in para [34](d) and (e)).

Conclusion

[38] Accordingly, we find generally in favour of the plaintiffs. We declare that, although considerations of general deterrence are relevant when setting the nominal sentence and minimum periods of imprisonment and in determining whether to grant leave to apply for home detention, they are not relevant when the Parole Board is considering applications for release on parole or home detention. . Factors relating to the particular individual that may affect the safety of the community, as provided for in ss 7, 28 and 35 of the Parole Act 2002, are, however, relevant when the Parole Board is considering such applications. We reserve leave to the plaintiffs to apply for further relief in any respects sought in their statements of claim and costs.

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