

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA208/2015  
[2015] NZCA 157**

BETWEEN

RICHARD LYALL GENGE  
Appellant

AND

CHIEF EXECUTIVE OF THE  
DEPARTMENT OF CORRECTIONS  
Respondent

Hearing: 4 May 2015

Court: Ellen France P, Randerson and Cooper JJ

Counsel: Appellant in person  
P J Gunn for Respondent

Judgment: 11 May 2015 at 9 am

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**JUDGMENT OF THE COURT**

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**The appeal is dismissed.**

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**REASONS OF THE COURT**

(Given by Ellen France P)

**Introduction**

[1] The appellant appeals against the decision of Mander J declining his application for habeas corpus.<sup>1</sup>

[2] Mr Genge is serving a sentence of life imprisonment with a minimum period of 15 years imposed in the High Court following conviction on one count of murder

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<sup>1</sup> *Genge v Superintendent of Christchurch Men's Prison* [2014] NZHC 705.

and one count of sexual violation by rape.<sup>2</sup> The sentence was imposed on 25 October 1995 and on the same day a warrant of commitment was issued pursuant to s 143 of the Criminal Justice Act 1985. A copy of the warrant of commitment signed by Fraser J has been produced.

[3] In dismissing Mr Genge's application Mander J considered the legality of Mr Genge's detention could be "worked through quite simply".<sup>3</sup> The Judge continued:<sup>4</sup>

- (a) A valid warrant of commitment was issued pursuant to s 143 of the Criminal Justice Act 1985;
- (b) The current iteration of that section is now found in s 91 of the Sentencing Act 2002;
- (c) The effect of s 21 of the Interpretation Act 1999 [dealing with powers exercised under repealed legislation] is that the warrant of commitment in respect of Mr Genge issued under the Criminal Justice Act remains valid and continues to have effect as if it had been issued under s 91 of the Sentencing Act 2002 which replaced, and corresponds to, s 143 of the Criminal Justice Act.

[4] The Judge was of the view s 17 of the Interpretation Act dealing with the effect of repeals would lead to the same result.<sup>5</sup>

### **The application for habeas corpus**

[5] On appeal, Mr Genge maintains his detention is unlawful because s 143 of the Criminal Justice Act has been repealed. Mr Genge relies on the fact that there is no transitional provision in the Sentencing Act dealing with the effect of the repeal of s 143.

[6] Mr Genge also argues that Mander J was wrong to rely on the sections in the Interpretation Act dealing with the effect of repeals because those sections were not in force either at the time the offences were committed or at the time Mr Genge's warrant was signed. The law prevents their being applied retrospectively. Mr Genge

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<sup>2</sup> *R v Kirner* HC Christchurch T43/95, 25 October 1995.

<sup>3</sup> *Genge v Superintendent of Christchurch Men's Prison*, above n 1, at [14].

<sup>4</sup> At [14].

<sup>5</sup> At [15].

refers in this respect to various provisions to that effect including s 7 of the Interpretation Act.<sup>6</sup>

[7] The respondent supports the judgment of Mander J.

### **Our assessment**

[8] There is no challenge to the lawfulness of Mr Genge's detention at the time the warrant was issued. Nor does Mr Genge make any complaint about the impact of repeal on questions of parole eligibility.<sup>7</sup> The only issue before us is therefore whether the repeal of s 143 of itself makes Mr Genge's detention unlawful. For the reasons given by Mander J we consider the answer is clear. The repeal of s 143 does not alter the validity of the warrant. Rather, the effect of the repeal of s 143 is preserved as specified in the Interpretation Act and we are satisfied the application of that Act does not involve any question of retrospectivity.

[9] Section 143 of the Criminal Justice Act dealt with warrants of commitment for a full-time custodial sentence. Section 143(1) required the Court when passing a full-time custodial sentence to direct the issue of the warrant. The section went on to provide for various matters to be dealt with in a warrant and as to signing of the warrants. The section read as follows:

#### **143 Warrant of commitment for full-time custodial sentence**

- (1) Where a court passes a full-time custodial sentence, it shall direct the issue of a warrant stating briefly the particulars of the offence and directing the detention of the offender in accordance with the sentence.
- (2) Every warrant issued under this section shall include a statement as to whether the offender was or was not legally represented as contemplated by subsection (1) of section 10 of this Act; and, if the offender was not legally represented, the warrant shall state the way in which the requirements of that section have been satisfied.
- (2A) Every warrant issued under this section must include a statement as to whether the offender is a person to whom section 21D applies; and, if that section applies to the offender, the warrant must state the way in which the requirements of that section have been satisfied.

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<sup>6</sup> See also Crimes Act 1961, s 10A and Sentencing Act 2002, s 6.

<sup>7</sup> *Genge v Superintendent of Christchurch Men's Prison*, above n 1, at n 4.

- (3) Where the sentence is passed by the High Court, any Judge of that court may sign the warrant.
- (4) Where the sentence is passed by a District Court, any District Court Judge or a Justice may sign the warrant.
- (5) Any warrant under this section may be issued in respect of any number of sentences passed in respect of the same offender at the same sitting of the court.

[10] The section was repealed as from 30 June 2002 by s 166(c) of the Sentencing Act 2002. The current equivalent is found in s 91 of the Sentencing Act. That section similarly requires the court imposing a sentence of imprisonment to issue a warrant directing the offender's detention and contains requirements as to the signing of the warrant. The section relevantly provides as follows:

**91 Warrant of commitment for sentence of imprisonment**

- (1) If a court imposes a sentence of imprisonment, a warrant must be issued stating briefly the particulars of the offence and directing the detention of the offender in accordance with the sentence.
- (2) A warrant issued under this section must include a statement as to whether the offender was or was not legally represented as contemplated by section 30(1).
- (3) If the offender was not legally represented, the warrant must state the way in which the requirements of that section have been satisfied.
- ...
- (6) If the sentence is imposed by a District Court, any District Court Judge may sign the warrant.
- (7) If the sentence is imposed by the High Court, any Judge of that court may sign the warrant.
- ...
- (9) A warrant under this section may be issued in respect of any number of sentences imposed in respect of the same offender at the same sitting of the court.

[11] As Mr Genge submits, s 166(c) of the Sentencing Act makes no provision for any transitional arrangements in relation to warrants issued under s 143. In that situation, reference can be made to the provisions in the Interpretation Act dealing with the effect of repeals.<sup>8</sup> No question of retrospectivity arises. It is enough to

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<sup>8</sup> Interpretation Act 1999, ss 17 and 21.

observe for the purposes of this case that the Interpretation Act was in force at the time of the repeal of the Criminal Justice Act and its application simply preserves the position as it was at the time.<sup>9</sup> As the Law Commission explained in its report that preceded the 1999 Act, “[t]he underlying principle [of these types of provisions] is that positions established by or under the old law are left unaffected by the new law.”<sup>10</sup>

[12] In particular, s 17(1) makes it plain the repeal of an enactment does not affect the validity of anything done, or “the previous operation” of the enactment “or anything done or suffered under it”. Section 17(1) relevantly reads as set out below:

**17 Effect of repeal generally**

- (1) The repeal of an enactment does not affect—
- (a) the validity, invalidity, effect, or consequences of anything done or suffered:
  - (b) an existing right, interest, title, immunity, or duty:
  - (c) an existing status or capacity:
  - ...
  - (e) the previous operation of the enactment or anything done or suffered under it.

[13] Both ss 17(1)(a) and (e) have the effect that the warrant of commitment remains valid and continues to have effect.

[14] Further, s 21 of the Interpretation Act, relied on by Mander J, provides that powers exercised under repealed legislation have continuing effect as if exercised under another corresponding enactment. Section 21 states:

**21 Powers exercised under repealed legislation to have continuing effect**

Anything done in the exercise of a power under a repealed enactment, and that is in effect immediately before that repeal,

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<sup>9</sup> Similar provisions were found in the Acts Interpretation Act 1924, ss 20(d), (e) and (h), 20A and 21.

<sup>10</sup> Law Commission *A New Interpretation Act to Avoid “Prolivity and Tautology”* (NZLC R17, 1990) at [224].

continues to have effect as if it had been exercised under any other enactment—

- (a) that, with or without modification, replaces, or that corresponds to, the enactment repealed; and
- (b) under which the power could be exercised.

[15] There is nothing on the face of it to suggest these provisions do not apply to preserve the validity of the warrant following the repeal of s 143.

[16] Mr Genge relies on a range of other materials to support his argument that the Judge was wrong to apply the Interpretation Act. We mention, briefly, the key matters to which he refers.

[17] First, Mr Genge refers to provisions preventing exposure to double jeopardy such as s 26(2) of the New Zealand Bill of Rights Act 1990.<sup>11</sup> However, there is no suggestion of any additional penalty or additional punishment. That makes this case different from *Morgan v Superintendent, Rimutaka Prison* to which Mr Genge refers.<sup>12</sup>

[18] Mr Morgan's case was that he was at the point in his sentence where he would have been entitled to be released from prison under the legislation applicable at the time he committed the offence. Under the new regime, the release date for someone in Mr Morgan's position was less favourable. He argued that this meant his penalty had been increased in a retrospective manner and as a result his detention was unlawful.<sup>13</sup> This argument was unsuccessful. The conclusion reached in that case was that the provisions prohibiting retrospectivity to the disadvantage of an offender were directed to the variations in the maximum applicable penalty and not to the particular penalty applying to the individual offender.<sup>14</sup>

[19] But, in any event, that is not Mr Genge's case. As we have noted, Mr Genge does not advance any issue about his eligibility for release on parole. For

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<sup>11</sup> See also International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 3 March 1976), art 14(7).

<sup>12</sup> *Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26, [2005] 3 NZLR 1.

<sup>13</sup> At [2].

<sup>14</sup> At [29], [57], [77] and [86] and see *Wilson v Parole Board* [2010] NZCA 269, [2010] 3 NZLR 399 at [42]–[45].

completeness we note Mr Genge is eligible for parole and he advised us he had been considered for parole on a number of occasions.

[20] Secondly, Mr Genge refers to material on the website of the New Zealand Parole Board that refers to the position applicable to some offenders sentenced under the Criminal Justice Act.<sup>15</sup> As we understand it, Mr Genge suggests it cannot be correct that some parts of the Act continue to apply but others do not. However, this argument overlooks the fact there are specific provisions in the Parole Act 2002 dealing with release dates and so on for some offenders sentenced under the Criminal Justice Act.<sup>16</sup> In other words, some provisions can be specifically saved or preserved although others are not. Nothing Mr Genge has referred to would displace the application of the Interpretation Act to a warrant issued under s 143.

[21] Finally, Mr Genge relies on a discussion about the objective of transitional provisions in a paper prepared by the Parliamentary Counsel Office on the Interpretation Act.<sup>17</sup>

[22] That discussion arose in the context of consideration of s 18 of the Interpretation Act dealing with the effect of repeal on existing rights and proceedings. In that context, reference is made to this Court's decision in *Foodstuffs (Auckland) Ltd v Commerce Commission*.<sup>18</sup> The paper cites the decision for the proposition that "the policy of the law in relation to transitional provisions was to avoid the unfairness and injustice of the retrospective deprivation of rights or interests".<sup>19</sup> There is no question about that principle but it simply does not arise here, where the validity of the original warrant is not in issue. The *Foodstuffs* case, by contrast, related to the applicability or otherwise of a new, more onerous, competition test. As we have noted, no question of retrospectivity arises here.

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<sup>15</sup> New Zealand Parole Board "FAQ" <<http://www.paroleboard.govt.nz/utility/faq.html>>.

<sup>16</sup> See for example Parole Act 2002, ss 87 and 104 and also s 97(9) which provides specifically for appeals lodged under Parts 4 or 6 of the Criminal Justice Act to be dealt with as if Part 6 had not been repealed.

<sup>17</sup> Parliamentary Counsel Office *Interpretation Act 1999: A discussion paper* (6 March 2013) at [2.44]–[2.54].

<sup>18</sup> *Foodstuffs (Auckland) Ltd v Commerce Commission* [2002] 1 NZLR 353.

<sup>19</sup> Parliamentary Counsel Office, above n 17, at [2.50].

[23] Accordingly, none of the matters to which Mr Genge has directed us suggest we should approach the case in a different manner from that taken by Mander J. On the contrary, we agree the effect of s 21 of the Interpretation Act is to make it clear that, on the repeal of s 143 of the Criminal Justice Act, the warrant continues to have effect as if it had been issued under s 91 of the Sentencing Act, the section which replaced and corresponds to s 143. The same outcome can be reached in reliance on s 17.

## **Result**

[24] For these reasons, the appeal is dismissed. At the hearing Mr Genge sought interim orders as to his release. It follows from our decision that this application is declined.

[25] We add Mr Genge disputed a court's ability to reserve judgment in habeas corpus applications. The Habeas Corpus Act 2001 is clear applications must be disposed of by the High Court "as a matter of priority and urgency".<sup>20</sup> The obligation on this Court in s 17(2) of the Act is to use our "best endeavours to ensure" these appeals are disposed of "as a matter of priority and urgency". Those requirements do not prevent either Court from reserving judgment.

Solicitors:  
Crown Law Office, Wellington for Respondent.

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<sup>20</sup> Habeas Corpus Act 2001, s 9(2).